

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-1220

B

To be argued by
BANCROFT LITTLEFIELD, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1220

P/S

UNITED STATES OF AMERICA,

Appellee,

—v.—

VINCENT ALOI, JOHN DIOGUARDI, RALPH
LOMBARDO and JOHN SAVINO,

Defendants-Appellants.

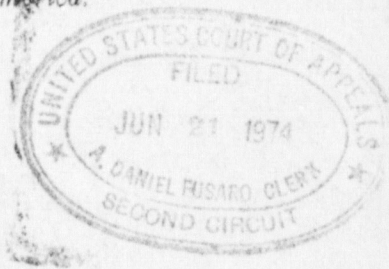
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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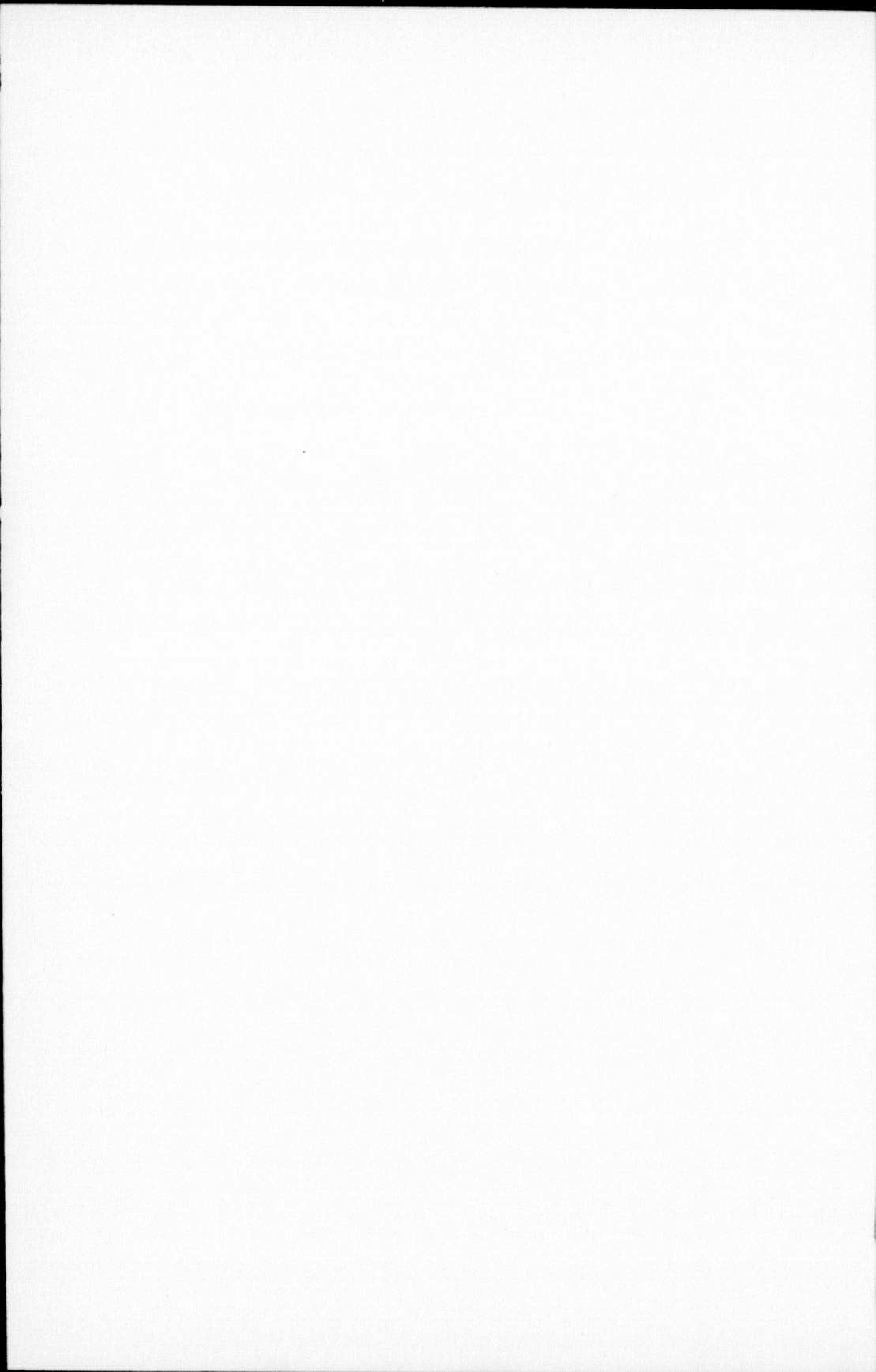


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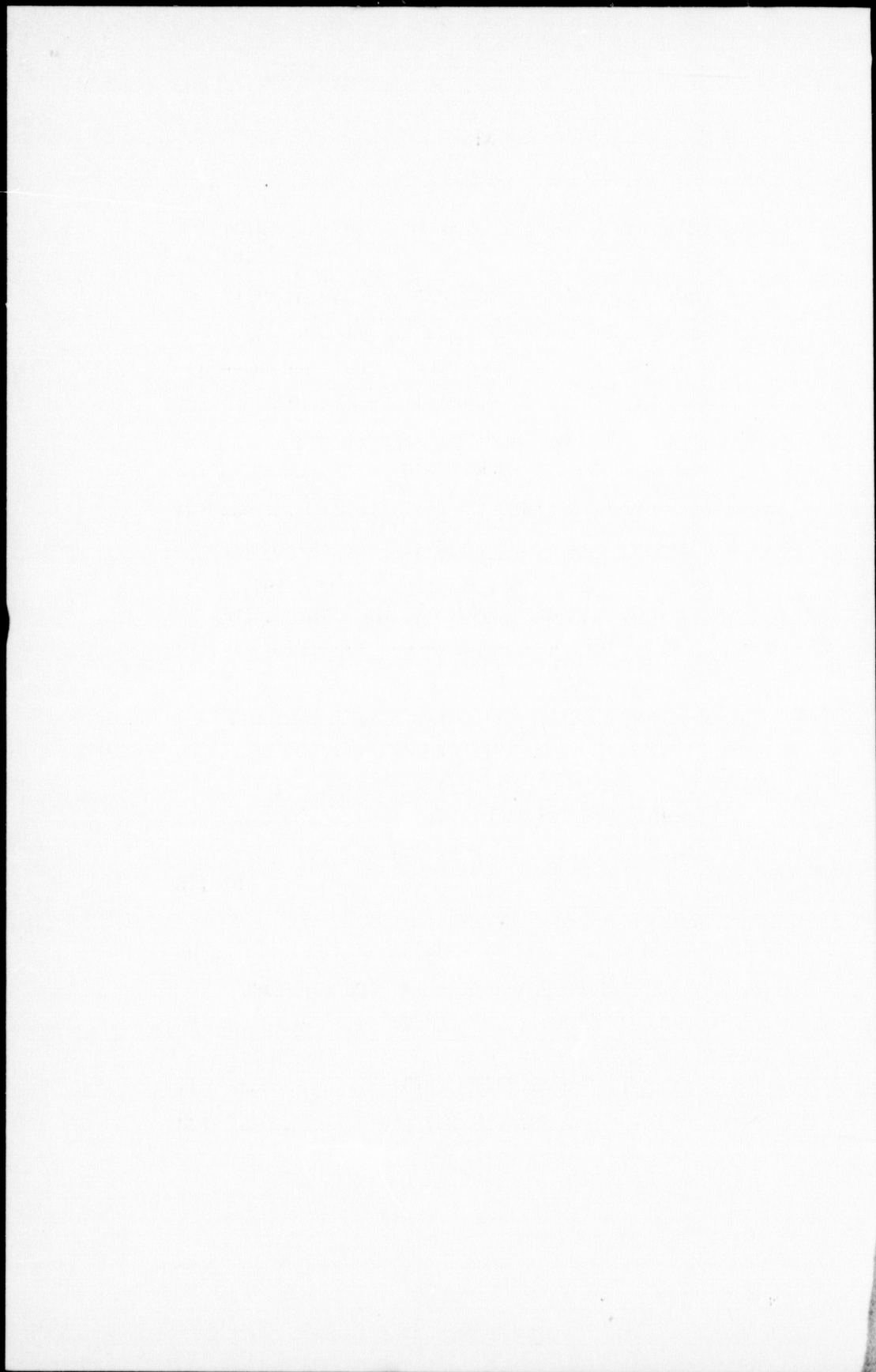
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UNITED STATES OF AMERICA,

Appellee,

—v.—

VINCENT ALOI, JOHN DIOGUARDI, RALPH LOMBARDO
and JOHN SAVINO,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Vincent Aloï, John Dioguardi, Ralph Lombardo and John Savino appeal from judgments of conviction entered on February 5, 1974, in the United States District Court for the Southern District of New York, after an eight week trial before the Honorable Whitman Knapp, United States District Judge, and a jury.

Indictment 73 Cr. 699 filed on July 19, 1973, charged Vincent Aloï, John Dioguardi, Ralph Lombardo, John Savino, and thirteen other defendants with conspiracy to commit stock fraud and with 37 substantive counts including mail fraud, wire fraud, stock fraud and use of a false offering circular in connection with an offer of securities. Prior to trial certain counts were severed and during trial

certain other counts were dismissed by agreement of the government, therefore the case was submitted to the jury only on Counts 1 through 18 (excluding Count 12).*

<i>Count</i>	<i>Defendants</i>	<i>Description of violation charged</i>	<i>Statutes violated</i>
1	All defendants	Conspiracy to violate provisions of securities laws, including use of mails in connection with stock fraud, and use of false offering circular.	Title 15, United States Code, Sections 77q(a), 77s(a), 77(x), and C.F.R. §§ 230.256 and 240.106-5; Title 18, United States Code, Section 371.
2-8	All defendants	Stock fraud	Title 15, United States Code, Sections 77q and 77x; Title 18, United States Code, Section 2.
9	Dioguardi, Lombardo (not Aloï and Savino) and six other defendants	Wire fraud	Title 18, United States Code, Sections 1343 and 2.
10, 11	Aloï, Dioguardi, Lombardo, Savino and seven other defendants	Wire fraud	Title 18, United States Code, Sections 1343 and 2.
13-17	All defendants	Mail fraud	Title 18, United States Code, Sections 1341 and 2.
18	All defendants	Use of false offering circular in connection with sale of securities	Title 15, United States Code, Sections 77s, 77x and 17 C.F.R., Section 230.256; Title 18 United States Code, Section 2.

* Counts 12, 19 and 37 did not charge the defendants on trial; Counts 20-36 which were mail fraud counts against all defendants were dismissed against the defendants on trial with the consent of the government to limit the number of counts which the jury had to consider; Count 38, a loansharking count against Lombardo, Dioguardi and Sebastian Aloï, was severed.

Indictment 73 Cr. 699 superseded indictment 73 Cr. 362 filed on April 24, 1973. The crimes charged in both indictments were identical, the only difference being the addition of some new defendants (not Aloï, Dioguardi, Lombardo or Savino) in the superseding indictment.

The trial of Vincent Aloï, John Dioguardi, Ralph Lombardo and John Savino commenced on October 30, 1973 * and concluded on December 22, 1973 when the jury returned guilty verdicts as follows:

Vincent Aloï was found guilty on Count 1 (conspiracy), Count 10 (wire fraud) and Count 18 (use of false offering circular). John Dioguardi and Ralph Lombardo were found guilty on Count 1 (conspiracy), Count 9 (wire fraud) and Count 18 (use of false offering circular). John Savino was found guilty on Count 1 (conspiracy), and Count 18 (use of false offering circular).

On February 5, 1974, the defendants were sentenced by Judge Knapp. Vincent Aloï received a total of nine years imprisonment and a \$16,000 fine. John Dioguardi received a total of ten years imprisonment (to be served concurrently with his existing nine year sentence on a previous conviction). Ralph Lombardo received a total of five years imprisonment and a \$16,000 fine. John Savino received a total of two years, six months imprisonment and a \$15,000 fine.**

* Pasquale Fusco was severed from the trial on November 29, 1973 after suffering an apparent heart attack.

** The sentences by count are as follows:

<i>Defendant</i>	<i>Count</i>	<i>Sentence</i>
Vincent Aloï	1	5 years imprisonment; \$10,000 fine.
	18	4 years imprisonment (consecutive to imprisonment on Count 1); \$5,000 fine.
	10	5 years imprisonment (execution of sentence suspended and 5 years probation); \$1,000 fine.
John Dioguardi	1	5 years imprisonment.
	18	5 years imprisonment (consecutive to imprisonment on Count 1);

[Footnote continued on following page]

Vincent Aloï, John Dioguardi and Ralph Lombardo were remanded on February 5, 1974 and are presently serving their sentences.* John Savino is at liberty on bail pending his appeal.

Statement of Facts

Summary

The facts at trial disclosed that in 1970 the common stock of At-Your-Service Leasing Corp. (AYSL), an insolvent New Jersey Corporation on the verge of bankruptcy, was fraudulently offered to the public.** This fraudulent public offering resulted from a secret agreement between two groups; one, headed by the defendant Vincent Aloï (the Aloï Group), had interests in AYSL through two of its

<i>Defendant</i>	<i>Count</i>	<i>Sentence</i>
	9	5 years imprisonment (execution of sentence suspended and 5 years probation).
Ralph Lombardo	1	5 years imprisonment; \$10,000 fine.
	18	5 years imprisonment, (concurrent to imprisonment on Count 1); \$5,000 fine.
	9	5 years imprisonment (execution of sentence suspended and 5 years probation); \$1,000 fine.
John Savino	1	2 years, 6 months imprisonment; \$10,000 fine.
	18	5 years imprisonment (execution of sentence suspended and 5 years probation); \$5,000 fine.

* Appeals to the Second Circuit by Vincent Aloï and Ralph Lombardo for bail pending appeal were denied.

** As of October 31, 1969, At-Your-Service Leasing had only \$158 in cash and negative net worth in excess of \$100,000.

members, Lombardo and Graifer; the other, headed by the defendant John Dioguardi controlled Michael Hellerman, a master stock swindler. These groups were rigidly structured hierarchies, and followed strict formalities in dealings with each other. Before lower echelon members or associates of one group were permitted to do business with members or associates of the other group, the superiors on each side had first to agree personally between themselves on the terms of the deal, and further to guarantee the performance of their subordinates. The agreement between these two groups to perpetrate the sale of worthless AYSL stock to the public evolved in various stages and was in fact halted for a time until a new set of conditions, established by the defendant Vincent Aloï, had been met.

The evidence established that in the spring of 1970, a public offering for \$300,000 of At-Your-Service Leasing stock was on the verge of total failure as almost no stock had been sold within the legal 90 day period.* As a result, the principals of AYSL, one of whom was Edmund Graifer, an associate of the Aloï Group,** and the defendant Ralph Lombardo, who was a subordinate of Sebastian "Buster" Aloï (hereinafter Buster Aloï) and a business associate of Graifer turned for assistance to Buster Aloï.*** Graifer and Lombardo met with Buster Aloï and directed Lombardo to contact Michael Hellerman, a stock swindler associated with and controlled by the defendant John Dioguardi**** and negotiate terms under which Hellerman would become in effect the undisclosed underwriter and would manage the

* The offering was a Regulation A type, \$150,000 minimum, \$300,000 maximum offering, which meant that a minimum amount of \$150,000 worth of stock (50,000 shares at \$3 share) had to be sold within 90 days or the offering had to be cancelled and all the monies returned.

** Edmund Graifer was indicted, pleaded guilty and testified for the government.

*** Sebastian "Buster" Aloï was the father of Vincent Aloï.

**** Dioguardi received 25% of whatever Hellerman made.

fraudulent sale of the AYSL stock to the public. After arrangements had been made between Hellerman and Lombardo and Graifer, Buster Aloï spoke with Dioguardi and confirmed the terms under which Hellerman would perpetrate the fraudulent offer. Among the terms agreed between Buster Aloï and Dioguardi was that a secret under-the-table kickback of \$45,000 would be paid Hellerman for the sale of \$150,000 worth of AYSL stock, half of which, or \$22,500 was to be paid "up front" (in advance) so that Hellerman could bribe crooked stockbrokers to tout the valueless stock to their customers. In short, Dioguardi by oral commitment to Buster Aloï guaranteed Hellerman's performance and the return of the "front" money in the event that Hellerman could not sell the stock, and Buster Aloï by oral commitment to Dioguardi guaranteed the payment of the balance of the \$45,000 kickback by AYSL and Graifer, when the deal was completed. The \$22,500 "front" money was thereafter delivered by Buster Aloï's subordinate, Lombardo, to Dioguardi for delivery in turn to the crooked brokers. At this stage, the defendants Dioguardi, Buster Aloï, Lombardo, Graifer and Hellerman were the principal members of the conspiracy to perpetrate the fraudulent offer of AYSL stock.*

The conspiracy progressed for a short period during which time efforts were made by Hellerman and various crooked brokers to sell the AYSL stock. However, an event thereafter intervened which, for a time halted the conspiracy, and ultimately led the defendants Vincent Aloï, John Savino and Pasquale Fusco to join the conspiracy after fundamental changes had been made in its terms. The defendants Fusco and Savino were associated with the Aloï group, in particular with both Buster Aloï and Vincent Aloï. After the front money had been delivered to Dioguardi by Lombardo, on behalf of the Aloï group, there

* Previous to trial Hellerman was convicted on his plea of guilty for his role in the AYSL fraud. In the present indictment, he was named as a co-conspirator but not as a defendant.

came a point in time when Fusco and Savino learned that Hellerman was to be paid the \$45,000 kickback for perpetrating the deal. However, by virtue of certain past events, Hellerman had been obligated to pay Fusco and Savino \$10,000 whenever he earned it, and the commitment by Buster Aloï to pay Hellerman the secret \$45,000 kickback had not taken into account this prior obligation.* Therefore, when Fusco and Savino learned of Hellerman's role in the fraud, and in particular the amount of his promised kickback, they immediately went to their superior, Vincent Aloï, and insisted that the deal be stopped.

In early July, 1970 Vincent Aloï, using his position of power both within his own group and in relation to Dioguardi, stalled the deal and obtained the return of the \$22,500 front money. The deal thereafter was only reinstated when Vincent Aloï established new terms which were agreed to by Hellerman and Dioguardi. These new terms required that Fusco and Savino be paid \$10,000 out of the \$45,000 kickback from AYSL, that Lombardo was also to receive \$10,000 from the \$45,000 as repayment by Hellerman of a loan shark obligation he had to Lombardo, that no front money would be put up by the Aloï group on behalf of AYSL, and that the \$45,000 kickback would be delivered to Vincent Aloï and then allocated by Aloï among Savino and Fusco, Lombardo and Dioguardi (on behalf of Hellerman). Dioguardi and Hellerman agreed to the new terms and the defendants Vincent Aloï, Pasquale Fusco and John Savino thereby joined the conspiracy, which began to move forward once more.

Thereafter, the fraudulent offering of stock was completed and the proceeds of the fraud were delivered by checks from TDA Securities, the underwriter, to AYSL. Subsequently when the checks had cleared, the \$45,000 kickback was delivered by Graifer to Lombardo who in

* A commitment previously made by Dioguardi to Vincent Aloï, which commitment bound Hellerman.

turn delivered it to Vincent Aloï who personally allocated \$10,000 to Fusco and Savino, \$10,000 to Lombardo and the balance of \$25,000 to Dioguardi.

The manipulation of AYSL stock continued into the after-market, after the fraudulent offering was completed. Eventually, the SEC intervened, began an investigation and subpoenaed Graifer to appear before it. At the SEC, Graifer learned for the first time that Hellerman had swindled AYSL and broken the deal made by Vincent Aloï and Dioguardi in that Hellerman had actually sold 137,000 shares of AYSL stock, when he had paid AYSL only for 50,000. Graifer immediately went to Vincent Aloï, who promised to work out the problem at a "sit down" with Dioguardi. The "sit down" however never took place because Dioguardi surrendered to begin serving a jail sentence.*

1. The Government's Case

A. The initial offering of AYSL stock

At-Your-Service Leasing Corp. ("AYSL"), located in Fort Lee, New Jersey, specialized in the long term leasing of luxury automobiles, Cadillacs, Lincoln-Continental, and Buick Electras. The principals of AYSL were Edmund Graifer and four certified public accountants**. There came a time in 1969 when the financial condition of AYSL became desperate; AYSL either had to raise funds by going public or go bankrupt.*** In July, 1969, the principals of

* This fact did not emerge until the testimony of Dioguardi. Originally the jury had learned only that Dioguardi had been unavailable for the "sit down."

** Sanford Price, Arthur Ferdinand, Murray Handler and Jack Ganek, who were also indicated, but their trial was severed.

*** The four accountants had borrowed in excess of \$100,000 from their own accounting clients to keep AYSL solvent, which loans they had personally guaranteed. Therefore, bankruptcy was not an acceptable alternative to them.

AYSL, (primarily the four accountants) reached an agreement with Andrew Nelson, a financial consultant, wherein he would assist in taking AYSL public.* In early 1970, Nelson, in turn, was successful in enlisting TDA Securities,** a brokerage house in Hempstead, Long Island, to act as the underwriter for the issue (Tr. 397-415).***

The SEC declared the offering of AYSL stock effective April 8, 1970, for a total period of 90 days, during which period up to \$300,000 of the securities (100,000 shares at \$3/share) could be offered and sold to the public. The offering period expired on July 7, 1970, and if a minimum of \$150,000 of the securities (50,000 shares at \$3/share) had not been sold the offering was to be cancelled and all monies collected returned to the subscribers (Tr. 295-297).

Due to AYSL's obviously weak financial condition, TDA was not successful in selling significant number of shares of AYSL stock. As the deadline of July 7th began to approach, the four accountants, who were aware of the financial implications inherent in the impending failure of the offering and also that their partner, Edmund Graifer, was associated with various unsavory individuals, approached Graifer and asked him to see what he could do among his associates to sell the issue (Tr. 426-27, 470-72).

At this time, Graifer was associated with Sebastian "Buster" Aloï,**** who had retired and was living in Miramar, Florida. Also associated with Buster Aloï was

* Andrew Nelson was indicted, plead guilty and testified at the trial.

** The principals of TDA Securities were Gilbert Dragani, Donald Fisher and Louis Nova, (the son-in-law to Dragani) all of whom were indicted and convicted on their pleas of guilty. Donald Fisher testified at the trial.

*** "Tr." refers to the trial transcript.

**** Sebastian "Buster" Aloï is the father of Vincent Aloï, the head of the Aloï group.

the defendant Ralph Lombardo, a friend of Graifer, who made regular trips to Florida to consult with Buster Aloï. Because of Graifer's relationship to Buster Aloï and to Lombardo, it was to them (and in particular to Buster Aloï) that he turned for help (Tr. 428-433).

In late May or early June, 1970, Graifer and Lombardo traveled to Florida and met with Buster Aloï. After Graifer explained AYSL's troubled financial situation, and that a short period remained in which the stock could be sold, Buster Aloï instructed Lombardo to make contact with Michael Hellerman in order to see if Hellerman could handle the fraudulent offering of AYSL stock. Hellerman was a stock swindler, who at that time was associated with John Dioguardi, who owned a percentage of the profits of, and in fact controlled, Michael Hellerman (Tr. 1717-18). Buster Aloï promised Graifer that if Dioguardi and Hellerman could sell the issue, he would "stand good" for Graifer, that is, guarantee Graifer's obligation in connection with the agreement and that Dioguardi, in turn, would "stand good" for Hellerman, a notorious figure previously known by Graifer to have swindled others (Tr. 470-479).

B. The Aloï group approaches Dioguardi and Hellerman to perpetrate the fraudulent offer of AYSL stock

At Buster Aloï's instructions, Lombardo returned to New York in early June and on his next visit to Hellerman's home in Queens, New York (to pick-up a weekly interest payment Hellerman owed Lombardo on a \$10,000 loan), asked Hellerman if he would be able, and at what terms he would be willing to perpetrate the AYSL fraud and in effect became the undisclosed underwriter of the offering. Hellerman stated his initial willingness pending the approval of Dioguardi, his superior. Hellerman told Lombardo, however, that it would be expensive, since brokers would have to be bribed to tout the

stock. Lombardo showed Hellerman the AYSL prospectus. Hellerman then told Lombardo what the terms of the deal would have to be. For selling one-half of the issue, or 50,000 shares, he required a secret, under-the-table kickback of \$45,000 from the proceeds of the offering and for the second 50,000 shares he would require an additional \$45,000 under-the-table payoff. Hellerman also required \$22,500 up front, which he was going to use to bribe brokers to tout the stock. Arrangements were therefore made for Lombardo and Hellerman to meet with Dioguardi to obtain Dioguardi's permission and guarantee (Tr. 1729-33, 1749-54, 1760-63, 1514-15).

On the day of that meeting, and prior to it, Lombardo set up a meeting with Graifer and Hellerman at Longchamps Restaurant, where the terms of the deal were reviewed. On the way to this meeting, Lombardo spelled out to Graifer what he wanted in return for having set up the deal: 1) that he be put on AYSL's payroll for \$200 per week; 2) that he have unlimited use of AYSL credit cards; and 3) that he have free use of AYSL automobiles (Tr. 481-482).

At the meeting, Graifer told Hellerman that the deal needed to be done before July 7th less than thirty days away. Hellerman told Graifer that there was no problem, and described to Graifer and the others present, including Lombardo, the way the deal would work. Included in Hellerman's explanation was a recitation of his other stock swindles, and how he manipulated upward the price of those stocks. Hellerman then said that he and Lombardo would go to Dioguardi and iron it all out. At this meeting, Hellerman, again in Lombardo's presence, stated that he wanted \$45,000 under-the-table as his share for doing the deal (Tr. 483-87, 1515-16, 1765).

When the Longchamps meeting was over, Lombardo and Graifer in one car, and Hellerman in another, drove to Dioguardi's office. On the way over, Lombardo told Graifer

to stay downstairs and not see Dioguardi, because Dioguardi was hot and Lombardo did not want Graifer involved. In fact, Dioguardi did not want to deal in person with Graifer. Participating in the meeting with Dioguardi were Lombardo and Hellerman. At the meeting, Lombardo explained the terms of the deal to Dioguardi. Dioguardi approved it, and told Lombardo that the \$22,500 up-front money would be protected (Tr. 487, 1518-20, 1770-71).

In order that the agreement and the guarantee of the front money be made binding between Dioguardi's side and Buster Aloï's group, it was necessary that the explicit terms of the agreement be set and confirmed personally between Dioguardi and Buster Aloï themselves. As a result, following Dioguardi's preliminary agreement with Lombardo, Lombardo and Hellerman left Dio's office and immediately telephoned Buster Aloï from a pay telephone downstairs.* During the telephone call, they related the substance of the tentative agreement to Buster Aloï and Dio thereafter personally spoke with and confirmed these terms with Buster Aloï (Tr. 490, 1773, 1776). This confirmation was required because no final agreement to perpetrate the crime was possible without Dioguardi's express guarantee of Hellerman's performance on the one hand, and Buster Aloï's guarantee of Graifer's obligations on behalf of AYSL on the other (Tr. 492-93). In other words Graifer and Lombardo from the Aloï group could not do business with Hellerman, from the Dio group, without their superiors' express authority, guaranteeing their commitments. After the telephone call, Hellerman and Lombardo went back upstairs and talked with Dioguardi. Lombardo thanked Dioguardi for speaking with Buster Aloï, and said that he would bring the \$22,500 in a few days (Tr. 1776).

Thereafter, in the middle of June, Lombardo obtained and delivered in cash, the \$22,500 front money to Dio's

* This telephone call constituted Count Nine.

office. Dio in turn instructed Hellerman and one of his associates, Jack Kelsey, to deliver the \$22,500 to a crooked broker who had agreed to assist in touting the worthless AYSL stock (Tr. 491, 498, 508-9, 1783-85, 1525).*

Hellerman, however, was not able to line up the brokers to dispose of the stock. Dioguardi told Hellerman that he was getting pressure for the return of the front money and that it had to be returned, since he had "guaranteed that money to Buster" (Tr. 1790). With the deal seemingly blocked, the money was returned to Dioguardi on July 7, 1970, the last day the stock could legitimately be sold to the public. Lombardo was there, and Dioguardi turned the money over to him. Hellerman explained to Lombardo how the deal could still be done without the front money. Lombardo then explained this to Dioguardi, and Lombardo stated that he was going to go to Vincent and Buster Aloï for permission for Hellerman to do the deal without the front money (Tr. 1789-94, 1803).

C. Hellerman's prior relationship to defendants Vincent Aloï, John Savino, Pasquale Fusco and Lombardo

At about the same time as the return of the \$22,500, another more serious obstacle to the deal arose. To understand this problem it is necessary to review Hellerman's relationship with the defendants. Hellerman's past relationships with the defendants Vincent Aloï, John Savino, Pasquale Fusco and Ralph Lombardo ultimately had an important effect on the final agreement reached between the Aloï group and Dioguardi's side.

* Jack Kelsey and Ira Schultz, were named as co-conspirators but not as defendants. Kelsey testified for the government and Schultz (who was called by the prosecutor to defense counsel's attention under *Brady v. Maryland*) testified for the defense.

In early 1969, Hellerman who at the time operated "Michael's Steak House" in Queens (Tr. 1713-14), and Dioguardi, Hellerman's silent partner (Tr. 1717-18), were involved in the promoting of a new corporation called Trimatrix. In the early stages of the promotion, the defendants Savino and Fusco put up \$10,000 * and in order to conceal their own involvement received 5,000 shares in Savino's wife's name, Lorraine. When Trimatrix thereafter sought to go public in 1969, the SEC prevented the offering from going forward. As a result the \$10,000 Savino and Fusco had put up was lost. Throughout the balance of 1969 and into early 1970, Fusco and Savino, who regularly hung out at Hellerman's restaurant, complained frequently and bitterly to a number of regular customers of the restaurant that Hellerman had lost their \$10,000. Both Fusco and Savino stated that they would like to have forced Hellerman to have returned the money, but, since Hellerman was "with" Johnny Dio—i.e., Dioguardi protected Hellerman—, they alone were without power to obtain the return of the \$10,000 (Tr. 1733-35, 1737-41, 3468-70).

However, in April 1970, Hellerman was summoned to Dioguardi's office at Jard Products in New York City. When he arrived, a "sit down", or a meeting to arbitrate a dispute between groups, was in progress with Vincent Aloï (Buster Aloï's son), Fusco and Dioguardi. Aloï stated that "his boys", when they dealt with Hellerman, always came up on the short end of the stick. Vincent Aloï insisted to Dioguardi, on behalf of Fusco and Savino, that Hellerman return the \$10,000 they had put up for Trimatrix. Dioguardi stated that Hellerman was not obligated to repay this money, but "for the sake of peace, friendship and respect," Hellerman (who was then broke), would repay the \$10,000 in the future when he earned it (Tr. 1741-42).

* \$2,000 was a check in Savino's wife's name and the balance was in cash.

At the time that Graifer and Lombardo sought Buster Aloï's assistance in Florida with the AYSL offering, Hellerman's obligation to repay Fusco and Savino was still outstanding. When Dioguardi and Buster Aloï agreed and guaranteed that Hellerman would be paid a \$45,000 kickback for perpetrating the fraudulent offer of AYSL stock for the Aloï group, no provision had been made to repay Fusco and Savino, apparently because Buster Aloï had been unaware of Dioguardi's commitment to Vincent Aloï.

D. Fusco and Savino approach Vincent Aloï and demand that he halt the AYSL deal until Dioguardi and Hellerman agree to repay the \$10,000 from Trimatrix out of the \$45,000 AYSL pay off.

Both Fusco and Savino drove cars leased from AYSL and Graifer frequently collected their car payments, which were often in arrears. In the middle of June, about a week after the agreement that Hellerman would sell the AYSL deal for a \$45,000 kickback had been guaranteed between Buster Aloï and Dioguardi, Graifer and Lombardo had arranged to meet at the Skyway Motel near JFK airport. While waiting for Lombardo to arrive, Graifer had a conversation with Fusco, Savino and other persons. Graifer told Fusco and Savino that Hellerman was taking AYSL public for a kickback of \$45,000, and that Buster Aloï had approved it. Savino and Fusco became very angry and demanded to know whether their superior, Vincent Aloï, knew of the deal and whether Graifer was aware of the fact that Hellerman owed them \$10,000. Savino stated that Hellerman was no good, that "he would swindle his own mother and father." Graifer responded that he did not know whether Vincent Aloï knew of the offering, but that Buster Aloï had guaranteed the deal with John Dioguardi, who was standing good for Hellerman. Fusco stated that he personally was going to see Vincent Aloï about this deal and strongly implied he would try to stop Hellerman from

participating in the deal because of the money owed to them by Hellerman (Tr. 497-98, 509-15).

Later, when Graifer told Lombardo what he had said to Savino and Fusco, Lombardo became very upset, expressing amazement that Graifer could have talked to those "ignoramuses" (Tr. 515-16).

E. The deal is halted; Graifer seeks to have Hellerman reinstated; Vincent Aloï sets new terms and conditions under which Hellerman is authorized to perpetrate the AYSL fraud; Hellerman and Dioguardi agree and Vincent Aloï, Fusco and Savino join the conspiracy

Within two days after Graifer had unwisely disclosed Hellerman's role in the AYSL offering to Fusco and Savino, Lombardo informed him that, despite previous commitments to the contrary, Hellerman would not be able to sell the issue. Graifer vigorously protested. He closely questioned Lombardo as to whether it was Fusco and Savino who had actually killed the deal. Lombardo implied that they had, and told Graifer that the next time he would know to keep his mouth shut in their presence (Tr. 516-18). Graifer immediately went to Florida and sought a meeting with Buster Aloï over the cancellation of the AYSL deal. Graifer complained to Buster Aloï that it was unfair that Fusco and Savino had interceded with Vincent Aloï to kill the deal because of money owed to them by Hellerman, since it was he (Graifer) who was made to suffer as a result. Buster Aloï told Graifer not to worry, that he (Buster Aloï) would get in touch with his son and straighten it out. That evening, Buster Aloï had Graifer dial Vincent Aloï's telephone number at his son's home in Suffern, New York.*

* This telephone call constituted Count Ten.

The senior Aloï spoke to his son in Italian but when he hung up, he told Graifer that everything would be straightened out and indicated that Hellerman would be authorized to do the deal (Tr. 520-523, 526).

Graifer then returned to New York and soon learned that Hellerman had, in fact, been reinstated in the deal. At about the same time, Hellerman was informed by Dioguardi that he could now do the AYSL deal but that Vincent Aloï had set new conditions and terms. First, the Aloï group would not put up any "front" money with which Hellerman could bribe brokers to tout the stock. Second, the \$45,000 kickback Hellerman was to receive would be paid entirely at the end of the deal. Third, out of the \$45,000 Hellerman was to receive, Fusco and Savino were to receive \$10,000 for the Trimatrix deal. Fourth, out of the \$45,000 Lombardo was to be re-paid the \$10,000 loan Hellerman had with him. Fifth, the \$45,000 was to be distributed by Vincent Aloï and Dioguardi, and Fusco, Savino and Lombardo's money would be paid out first. Sixth, Hellerman should not ask Lombardo or Graifer, associates of the Aloï Group, for the money but should handle it solely through Dioguardi. Lombardo acknowledged these new terms to both Hellerman and Graifer, admitting they came about because Savino and Fusco had complained to Vincent Aloï. In the middle of July, Dioguardi and Hellerman agreed to the new terms set by Vincent Aloï, the terms of the deal were put "on record" between Dioguardi and Vincent Aloï, and Hellerman began to sell the offering, which by now had legally expired (Tr. 532-34, 1829-32, 1836-38, 1840-42).

Lombardo then met with Hellerman and Dioguardi at the latter's office. Hellerman explained to both of them how the deal would be done, despite the fact that the July 7th deadline for the offering had expired and it was at that

time illegal to sell shares of AYSL. Hellerman explained to them that to solve the deadline problem confirmations of sale would be back-dated to a date prior to July 7th. Lombardo said that Graifer was close with TDA Securities (the underwriter in name on the prospectus) and that he could get them to back-date the confirmations. Lombardo also told Hellerman that he, Lombardo, didn't care how much Hellerman "robbed" from TDA, because Lombardo wanted to give Hellerman an incentive to sell the second 50,000 shares (Tr. 1840-43).

Hellerman at this time had effective control over the underwriter, TDA Securities and its principals, Dragani and Fisher, because TDA itself was on the verge of financial collapse. This control enabled Hellerman to obtain two sets of fraudulent confirmations, one showing a purchase of AYSL stock as of a certain date and second reflecting its sale two weeks later at almost a 100% profit. Using these purchase and sale confirmations as a promotional device, Hellerman and his associates began obtaining subscribers, essentially giving them guarantees against losses (Tr. 1846).

In mid-July in the course of this effort, Hellerman had occasion to meet Pasquale Fusco in the mid-town area of New York. Fusco asked how the deal was going and invited Hellerman to join him with Vincent Aloï for a drink at the Spindletop Restaurant nearby, which Hellerman did. At the Spindletop, Vincent Aloï, Fusco and Hellerman discussed the deal. Aloï exhorted Hellerman to do the deal right and quickly, so that "his boys" could get their money this time and pressed Hellerman to "do something right for a change" and get the deal done (Tr. 1846-50). A few days later, both Savino and Fusco visited Hellerman at his offices at Stoma Investment in New York City. The subject of this meeting was the fraudulent offering of AYSL stock.

Savino and Fusco asked how the deal was proceeding and pressed him further to complete the deal as soon as possible so that they could get their money (Tr. 1853-54).

On July 28, 1970, three weeks after the stock offering had legally expired, a closing, or the appearance of a closing, on the first half of the AYSL issue was held at Hellerman's offices at Stoma Investment in New York. Present were Hellerman, Graifer, Arthur Ferdinand (who was one of the four accountants and a principal of AYSL) the principals of TDA securities, Andrew Nelson and an associate,* and Ralph Lombardo who was there as a representative of Vincent Aloï. Also present was Hellerman's attorney, Morris Winter. When Graifer and Ferdinand first arrived at Hellerman's office, Lombardo took Ferdinand aside and told him explicitly that "we are going to have a closing. I want you to know that we did this deal for Ed [Graifer]" (Tr. 538-41, 1855-56).

At the closing, Hellerman produced only \$87,900 in checks for TDA Securities from subscribers or purchasers of the AYSL shares. Since this was less than the required \$150,000 minimum, Hellerman directed his attorney Morris Winter** to write out a check for \$62,100 which brought the total up to \$150,000 although the Winter check was to be held by TDA and not negotiated. It was agreed among all present that to cover the deadline problem, TDA Securities' records would be back-dated to July 7th. TDA Securities then wrote a series of checks to AYSL for the proceeds of the offering (less TDA's commissions) which checks were to be deposited by AYSL as funds cleared. During the course of the closing, Lombardo explained his presence

* A lawyer named Gerald Miller, a defendant, who was convicted on his plea of guilty.

** Winter was indicted, pleaded guilty and testified for the Government.

there by telling Hellerman that "he just wanted to make sure everything was all right, wanted to be able to report back to Vinny how everything was going. He just wanted to know what was going on." As the closing was breaking up, Lombardo told Hellerman that as soon as the checks cleared, Hellerman should contact Dioguardi, and then "Johnny and Vinny will straighten out the money" (Tr. 541-46, 1856-64).

Hellerman accomplished the sale of additional AYSL shares by manipulating the trading of AYSL stock in the over-the-counter market with the cooperation of TDA Securities by creating the appearance of active buying and selling. This manipulation was essential to generate the funds for the full offering. In actual fact, TDA sold AYSL stock to a broker at Brad-Schaf,* who in turn sold it to Wanderon & Co., which was associated with TDA. Wanderon in turn sold the stock back to TDA, thus completing a full circle. In this manner, the price was raised almost $2\frac{1}{2}$ points in a short time from \$3 per share, when in actual fact, no shares had been legitimately traded (Tr. 1881-82). During the course of this manipulation, Hellerman, Graifer and Lombardo met at a diner in Hempstead to review the manipulation, and Hellerman reported that the manipulation was going well (Tr. 574).

F. The secret \$45,000 payoff is delivered to Vincent Aloï and Dioguardi, who allocate \$10,000 to Fusco and Savino and \$10,000 to Lombardo; \$25,000 is used by Dioguardi to pay an obligation he and Hellerman incurred on a prior deal

On August 17, 1970, the day the last of the offering checks cleared, Graifer cashed a \$45,000 AYSL check and

* Gary Fredericks, who was indicted and convicted on his plea of guilty.

delivered the cash to Lombardo. He gave Lombardo an AYSL credit card, and told Lombardo that, as promised, Lombardo would be put on AYSL's payroll as of that day, which was a Monday, for \$200 a week and further, that Lombardo would be permitted to switch cars as often as he wished (Tr. 553-55, 559-60, 567). Indeed, from August, 1970 through March, 1971, Lombardo was on the AYSL payroll at the rate of \$200 per week, yet he did no work for the company (Tr. 622, 664, 1436, 1438, 1443).

Lombardo thereafter took the cash and delivered it to Vincent Aloï. Lombardo told Graifer he was not taking out his \$10,000 but that he would receive it from Aloï. The Aloï-Dioguardi meeting was arranged that day. Dioguardi related the meeting to Hellerman stating that Aloï delivered the whole \$45,000 to him. Dioguardi, following the rigid formalities that existed between these two groups, then returned \$20,000 to Vincent Aloï, who in Dioguardi's presence allocated \$10,000 to Fusco and Savino and \$10,000 to Lombardo. Dioguardi then walked over to Anthony DiLorenzo's office to repay \$25,000 owed by him and Hellerman from an earlier deal (Tr. 567-68, 570, 1868-74). Lombardo thereafter confirmed to Graifer that Aloï had distributed the \$45,000; Savino similarly confirmed this to Hellerman during a conversation at Hellerman's house and to Graifer in 1971 when Graifer called to collect back car-rental payments; and Fusco similarly confirmed this to Graifer when the two met in Florida on September 18, 1970 (Tr. 570, 1912, 619-20, 652).

Hellerman continued the manipulation into the middle and later part of August, 1970. At one point during the manipulation, Hellerman obtained a check for \$37,500 from the proceeds of the manipulation. The check was sitting on his desk when Graifer happened to visit Hellerman, and Graifer asked to borrow the money for a few weeks until

the second part of the closing occurred in order to purchase some new cars for AYSL. Hellerman agreed. However, the loan was not made a matter of record with Dioguardi for Hellerman's side and with Lombardo or Buster Aloï for Graifer's side. When Dioguardi discovered that Hellerman had made this loan to Graifer without authority, he was furious and sharply critical of Hellerman because Hellerman had received no guarantee that he would get the money back from Graifer. Dioguardi stated to Hellerman, "They don't have to give you the \$37,500 back, Vinny don't know about it, it's not on record with me." A short while later, Lombardo and Graifer were summoned to Dioguardi's office; Graifer remained downstairs. The \$37,500 loan was then "put on record" between Dioguardi and Lombardo, and Graifer in turn promised to repay the money in a few weeks time (Tr. 583, 1902-05).

However, before Graifer could pay the \$37,500 back, he was subpoenaed to testify before the SEC in connection with an investigation of the AYSL offering. Graifer appeared before the SEC on September 16, 1970. For the first time Graifer learned that Hellerman had actually broken the deal, in that while Hellerman had paid him for only 50,000 shares, Hellerman had actually sold 137,000 shares and collected the proceeds (Tr. 584, 594, 5988-99).

Immediately on leaving the SEC, Graifer contacted Lombardo, who arranged a meeting the next day with Vincent Aloï at the Tamcrest Country Club in New Jersey. At the meeting Graifer informed Vincent Aloï of what he had learned at the SEC and complained that, as Vincent Aloï knew, he, Graifer, had lived up to his end of the deal, and paid the \$45,000 which Aloï had allocated. Graifer said he thought that Hellerman should live up to his end as well and urged that he (Graifer) not be required to repay Hellerman the \$37,500 as promised since it then appeared

Hellerman owed him in excess of \$150,000 for the additional shares of AYSL stock he had apparently sold. Aloï indicated his knowledge that Graifer had complied fully with the terms of the deal and promised to have a "sit down" with Dioguardi to settle the problem (Tr. 598-605). However, on October 1, 1970, before Aloï could arrange a "sit down", Dioguardi surrendered to begin serving a 5 year sentence on an earlier federal bankruptcy fraud conviction (Tr. 4147, 4285, 4395).

Graifer again met with Aloï in December, 1970, and told Aloï that Hellerman never accounted to him for the additional shares traded. Aloï told Graifer that he had not been able to get in touch with Dioguardi, and that he was sorry he had ever gotten involved in the deal, that he had done it as an accommodation for his father (Tr. 610-11).

In December, 1970, Graifer appeared for a second time before the SEC. On this occasion, he learned that the SEC knew about the \$45,000 payoff. Graifer told this to Lombardo, and told Lombardo that he was afraid Hellerman was talking. Lombardo said that if that were true, Hellerman would be dealt with (Tr. 614).

In February, 1971, Graifer met with Aloï again, in New York City, and Graifer again told Aloï that Hellerman had never paid Graifer for the additional shares traded. Aloï complained that all he got out of the deal was aggravation, while Lombardo got \$200 a week, credit cards, and a new car. Graifer also told Aloï about Graifer's second SEC appearance, and that he thought Hellerman may be talking since the SEC knew about the \$45,000. Aloï told Graifer that Hellerman need not worry him, that everything would be taken care of in due time. Aloï told Graifer not to contact Hellerman any more (Tr. 615-18, 653-54).

2. The Defense Case

A. Dioguardi

Dioguardi called two witnesses, Ira Schultz and Joseph Bald and testified himself. Ira Schultz's testimony consisted of denials that he was involved in the AYSL deal, denials that he ever met with Hellerman and Dioguardi to discuss the deal, and denials that he had received \$22,500 from Hellerman to bribe brokers to tout AYSL stock (Tr. 3687-3700). Schultz admitted that he knew Dioguardi and that Hellerman had introduced him to Dioguardi (Tr. 3219-20). Schultz admitted that Hellerman, his cousin, had asked him to put money in a bank vault because Hellerman did not want to carry around a lot of cash, and that a short while later, he returned the money to Hellerman (Tr. 3700-3703). Schultz admitted that he had previously been convicted for perjury in connection with the Imperial stock fraud (Tr. 3709-10). He also stated that his memory of events in connection with Hellerman was very bad (Tr. 3723-24).

Joseph Bald testified that in late summer, 1970, Hellerman had told him that he and Dioguardi were not involved in any stock swindles at the time (Tr. 3850-52), and yet when Bald and Hellerman met on December 22, 1970 at Ratazzi's Restaurant with a man whom Hellerman knew to be an FBI agent,* Hellerman told the agent that he

* Paul Brana was the undercover agent, involved in investigating the bribery of the Administrative Assistant of United States Senator Hiram Fong, Robert Carson. Brana testified on rebuttal that this conversation with Hellerman and Bald was not recorded, as other conversations involved in this investigation were similarly not recorded, contrary to Dioguardi's assertion at page 18, footnote, that all other conversations had been recorded (Tr. 5037-38). Moreover, Bald testified that he had an "impression" that this conversation was recorded, but that he had no recollection of being shown a transcript of that conversation (Tr. 3939-40).

was so involved. When Bald started to contradict Hellerman, Hellerman allegedly winked at Bald, and kicked him under the table (Tr. 3853-56). Bald admitted to having been involved in a number of stock swindles including AYSL, and in the bribery attempt of Robert Carson (Tr. 3839-40, 3861, 3968-69, 3994-95).

Dioguardi testified in his own behalf, and admitted prior convictions for bankruptcy fraud and income tax evasion (Tr. 4143). He stated that he had known Michael Hellerman since 1964, and had social and business relationships (Dioguardi supplied advertising specialties from Jard Products to Hellerman's restaurant) with Hellerman since 1967 (Tr. 4145, 4149-58). Dioguardi made himself out to be a legitimate businessman running the affairs of Jard Products; however, he could not recall the names of more than three salesmen even though more than fifty salesmen were allegedly employed by Jard (Tr. 4443-44). In 1968, Hellerman moved to Bayside, nearby to Dioguardi (Tr. 4183). Dioguardi testified that thereafter, the nature of his relationship with Hellerman was as the patsy for Hellerman's swindles, including a stock called Lilly-Lyn (Tr. 4195-4203, 4207-09), a mortgage on a house purchased for Dioguardi's girl-friend (Tr. 4209-4227, 4232-4237) and rent due on office space subleased by Hellerman (Stoma Investments) from Dioguardi (Jard Products) (Tr. 4245-4255). Dioguardi denied any involvement with Hellerman in the AYSL fraud (Tr. 4272-73, 4292-96) and denied being associated with Hellerman in any of Hellerman's deals (Tr. 4383-84).

B. Lombardo

Lombardo testified in his own behalf. He stated that currently he owned car washes (4618-19), and that in 1970 his business was as an insurance consultant. He knew Vincent and Buster Aloj, and John Savino and Pasquale Fusco, and he wrote insurance policies for them (Tr. 4636-38). He met Edmund Graifer through Charles

San Filipo, and worked on AYSL's insurance problems. In that connection, he testified that he went to Florida with Graifer to open up a Florida branch of AYSL and met with Buster Aloï while there, but denied meeting with Buster Aloï to discuss AYSL's going public (Tr. 4624-26, 4639-47). He denied any knowledge of or involvement in the AYSL fraud (Tr. 4660-61). Lombardo denied that he ever loaned \$10,000 to Hellerman, and denied receiving \$10,000 from Vincent Aloï from the proceeds of the AYSL offering (Tr. 4638, 4647). He denied ever giving to, or receiving back, \$22,500 from Dioguardi, though he admitted he knew Dioguardi (Tr. 4634). While he admitted being in Hellerman's office during the AYSL closing, he testified that his presence there was completely unrelated to the closing; he was there to get information on a free vacation that Hellerman had promised him (Tr. 4648-59). Lombardo admitted being on the AYSL payroll, but maintained that he did work for the company (Tr. 4639, 4650-57).

On cross-examination, the Government impeached Lombardo's statement on direct that he was a loanshark victim of Graifer rather than a loanshark himself, and introduced into evidence lists seized from Lombardo which contained detailed accounts of weekly appointments Lombardo had with a large number of individuals (almost all of whom were identified only by nicknames, such as "Big Al" and "Jimmy Pancake"), including entries for "Mike H" (Hellerman) and Ed G. (Graifer). He also admitted that he was placed on the payroll of AYSL the same exact date that AYSL received the proceeds from the stock offering.

C. Aloï

Aloï called one witness, Larry Landi, a head waiter at the Spindletop Restaurant.* He testified that he knew

* Aloï called this witness after the Government's only rebuttal witness, Paul Brana.

Vincent Aloï and Michael Hellerman as patrons of the restaurant (Tr. 5046-47). He testified that he never saw Aloï and Hellerman together at the Spindletop, and that he never saw Aloï in the restaurant in the late afternoon, but only at around 8:30 in the evening (Tr. 5047-48).

On cross-examination, Landi admitted that he worked in the dining area of the restaurant, and did not pay attention to who was having conversations with whom at the bar (Tr. 5049-50).*

D. Savino

Savino neither took the stand nor presented any evidence.

3. The Government's Rebuttal

The Government called FBI Special Agent Paul Brana in rebuttal. He testified that in 1970, he was acting in an undercover capacity investigating Robert Carson, Administrative Assistant to United States Senator Hiram Fong, in connection with attempts to fix indictments which had been returned in the Southern District of New York (Tr. 4991-94). In that connection, he had occasion to have a conversation with Joseph Bald and Michael Hellerman at Ratazzi's Restaurant on December 22, 1970. Brana testified that on that occasion, he was not wearing either a recording device or a transmitting device (Tr. 4994). The subject of that meeting was the possibility of bribing a public official in Washington to impede stock fraud indictments expected to be returned in the Southern District of New York. Brana testified that at the time of that meeting he was very familiar with the name Johnny Dio, and that his name was never mentioned during the Ratazzi meeting (Tr. 4998-99).

* It will be recalled that Hellerman testified that he had a drink with Aloï and Fusco at the Spindletop.

ARGUMENT

POINT I

The evidence against the appellants was sufficient to establish their guilt as to the conspiracy count and the substantive counts.

Three appellants, Lombardo, Aloï, and Savino, argue that there was insufficient evidence to support their convictions* and all appellants attack their convictions under Count Eighteen. These arguments are without merit.

The evidence showed that two hierarchical groups were involved in executing the AYSL fraud. Associated with one group was Edmond Graifer. When Graifer needed assistance in taking AYSL public, after all legitimate means had failed, he contacted Ralph Lombardo who worked for Vincent Aloï and Buster Aloï. Lombardo and Graifer then consulted Buster Aloï about the deal. Aloï suggested they discuss the deal with Michael Hellerman who subsequently agreed to conduct the fraudulent offering of AYSL stock. Hellerman was "with" John Dioguardi, the top figure in the second group involved, and before Hellerman could agree to do the AYSL deal, Dioguardi had to give Hellerman authority to do so, and had to confirm and guarantee the terms of the deal with Buster Aloï. During the fraud, when terms had to be discussed and problems arose, matters were settled at the highest level: between Dioguardi, for Hellerman, and Buster Aloï and later on,

* Dioguardi for the most part attacks his convictions not on the issue of sufficiency, but rather on the alleged defects in the charge to the jury. The Government responds to this argument in Point II, *infra*.

Vincent Aloï for Lombardo, Graifer and AYSL. John Savino and Pasquale Fusco worked for Vincent Aloï, Buster Aloï's son. They put a temporary halt to the deal by going to Vincent Aloï and complaining that Hellerman, who they knew was doing the AYSL fraud for a secret \$45,000 kick-back, owed them \$10,000 which Dioguardi had guaranteed would be repaid when Hellerman had the money. Eventually, the deal was reinstated when Vincent Aloï established new terms, approved by Savino and Fusco and agreed to by John Dioguardi, wherein Savino and Fusco would receive repayment of the \$10,000.

The roles of these defendants were as the men-behind-the-scenes, men with sufficient position and power to have others actually commit the fraud for them, thereby hoping to achieve insulation for themselves from possible detection.

The evidence of these highly structured groups with their formal interrelationships, when combined with the other evidence at trial gives rise to a number of inferences which the jury was warranted in finding. On appeal, the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.* This includes circumstantial evidence and inferences drawn therefrom. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

A. Ralph Lombardo

Lombardo was one of these men behind-the-scenes. He was convicted of conspiracy (Count One), wire fraud (Count Nine), and the use of a fraudulent offering circular (Count Eighteen). The evidence was more than sufficient to sustain these verdicts.

* The following argument regarding sufficiency of the evidence will draw on the facts previously discussed in the Statement of Facts. Transcript citations will be repeated.

1. Conspiracy Count

Lombardo argues that while the proof established that he knew \$45,000 was being paid under the table and that this had "some connection" with AYSL going public, the Government failed to establish that he knew there was a violation of federal law involved, i.e. a scheme to defraud the public. This argument is without merit.

The evidence established beyond any shadow of a doubt that Lombardo was a knowing member of a conspiracy whose object was to foist a worthless stock on an unknowing public. Lombardo knew that Hellerman was a swindler because at the Longchamps meeting, when Hellerman explained how he would perpetrate the AYSL fraud, he also told Lombardo and Graifer details about his other stock manipulations (Tr. 1765-66). With respect to the AYSL offering, Lombardo knew that a \$45,000 kickback was to be paid under-the-table to Michael Hellerman, having negotiated it with Hellerman, and he knew of Dioguardi's role in guaranteeing Hellerman's participation. By definition, an under-the-table payment means a payment not disclosed, in the prospectus or anywhere else. Lombardo knew that Hellerman required \$22,500 of this \$45,000 "up-front" to bribe brokers to tout the stock (Tr. 483-87, 1729-33, 1749-54, 1760-65). Lombardo supplied the \$22,500 to Dioguardi, and it was returned to him by Dioguardi a few weeks later when the deal was encountering problems (Tr. 498, 508-9, 1783-85, 1525-30, 1798, 1801, 1803). Lombardo knew that July 7th was the deadline for selling the stock (Tr. 1789-94, 1803, 1841). Indeed, he participated in the discussion when Hellerman talked about back-dating the confirmations, and commented himself that Graifer could get TDA to do it (Tr. 1842). Lombardo also attended the fraudulent closing on July 28, 1970 at Hellerman's office and knew at the time that the deadline had passed. Lombardo knew that the AYSL deal entailed a scheme to defraud, and that people could be hurt financially. In discussing Hellerman's ability

to sell the second half of the offering, Lombardo told Hellerman that he did not care how much Hellerman "robbed" from TDA—he wanted Hellerman to have an incentive to do the second 50,000 shares (Tr. 1843). Lombardo demonstrated his guilty consciousness when, in December 1970, Graifer told him that he, Graifer, had just been before the SEC, and that they knew about the \$45,000 kickback. When Lombardo heard that Graifer suspected Hellerman of talking to the authorities, Lombardo said if that were true, Hellerman would be "dealt with" (Tr. 614).

Lombardo's stake in the fraud was clear: in return for having the deal done for Graifer, Lombardo wanted to be put on AYSL's payroll for \$200 per week and to have free use of AYSL cars and AYSL credit cards (Tr. 481-82). His terms were met, and when Graifer turned over the \$45,000 to Lombardo, he also gave Lombardo AYSL credit cards, and told him that he was on the payroll and had free use of AYSL cars (Tr. 553, 559-60, 567). Following the completion of the fraudulent deal, Lombardo was put on AYSL's payroll at \$200 per week and continued receiving \$200 weekly payments for eight months during which time he did no work for the company (Tr. 622, 664, 1436, 1438, 1443). As it turned out, when Vincent Aloï instituted the new terms on which the fraud could continue, Lombardo's take increased by \$10,000, which he received out of the \$45,000, in payment of Hellerman's loansharking debt (Tr. 570, 1729-33).

Lombardo's actions to further the fraud were numerous: he took Graifer to see Buster Aloï in Florida to see if the Aloï group could help in taking AYSL public (Tr. 431-32, 470-72, 474-79); Lombardo contacted Hellerman and spelled out what needed to be done, showing Hellerman an AYSL prospectus (Tr. 1749-54); Lombardo arranged for Graifer to meet Hellerman at Longchamps Restaurant (480-86, 1765); Lombardo went with Hellerman to Dioguardi's office where the deal was set out for Dioguardi's approval (Tr.

1519-20, 1770-71); Lombardo called Buster Aloï to confirm the deal (Tr. 490; 1773); Lombardo provided the \$22,500 up-front money to bribe the brokers (Tr. 498, 509-09); Lombardo participated in the meeting at Dioguardi's office when Vincent Aloï's new terms were put "on record" (Tr. 533, 535, 1838-1842); Lombardo was present at the closing on behalf of Vincent Aloï, to make sure everything went all right (Tr. 538-541, 1856-1860); Lombardo delivered the \$45,000 to Vincent Aloï for distribution (Tr. 567-68, 570).

Lombardo argues that since he was not aware of all of the intricacies of securities law and of how Hellerman planned to take AYSL public, he cannot be held to have conspired to violate the securities laws. It is not necessary, however, for Lombardo to have had knowledge of all of the intricacies of the scheme. It is sufficient if he knew of the objective of the conspiracy, and worked to bring it about. *United States v. Projansky*, 485 F.2d 123, 135 (2d Cir.), cert. denied, 409 U.S. 1006 (1972). On the basis of the foregoing facts, there can be no doubt that Lombardo knew what the objective of the conspiracy was and helped to bring it about.

2. Wire Fraud Count

Count Nine referred to the telephone call placed from the cigar store to Buster Aloï after the meeting with Dioguardi, Hellerman, Lombardo and Kelsey. Both Lombardo and Dioguardi participated in this call to Buster Aloï. This call was made after the original terms of the deal were agreed on among the participants at the meeting, and Lombardo needed to confirm them with Buster Aloï in Florida.

Lombardo attacks his conviction under Count Nine on two grounds: first, since the conspiracy was not proven, his conviction under the *Pinkerton* theory is improper; and second, that it is not a violation of Title 18, United States Code, Section 1343 to use the interstate telephone lines to

confirm the terms of a scheme to defraud, since the statute requires the call to be for the purpose of *executing* the scheme.*

Since the Government submits that the conspiracy was proved beyond peradventure, Lombardo's first allegation is moot.

Lombardo, in conjunction with Dioguardi, argues that the subject telephone call was placed at a time before the scheme existed, and therefore was not "for the purpose of executing such scheme," citing *United States v. Buckner*, 108 F.2d 921 (2d Cir.), *cert. denied*, 309 U.S. 669 (1940).

This argument is based on a faulty premise. By the time of the subject telephone call, the scheme to defraud did in fact already exist. By this time, Graifer had approached Lombardo to do the deal; Graifer and Lombardo had gone to Florida to meet with Buster Aloï, who approved the venture and instructed Lombardo to get Hellerman to do the deal; Lombardo had met with Hellerman and they had discussed the terms of the deal, including the \$45,000 under-the-table payment; Lombardo had told Graifer what compensation he, Lombardo, wanted out of the deal; Graifer, Hellerman, Lombardo and Kelsey had met at Longchamps where the terms of the deal were spelled out; and Hellerman, Lombardo and Kelsey had met with Dioguardi and informed him of the terms of the deal, including the \$22,500 "up-front" money, and Dioguardi had approved. All that had to be done thereafter was to obtain Buster Aloï's blessing and his guarantee to Dioguardi, and that was accomplished by the telephone call. Clearly, the scheme to defraud already existed, both as to the conditions of the deal and its objective, as evidenced by the \$45,000 having

* Lombardo adopts Dioguardi's argument contained in the latter's Point III. The Government's argument herein applies to Dioguardi as well as Lombardo.

been set as the under-the-table payment, and by Lombardo's having set out his expected compensation, including being on the AYSL payroll even though he would never do any work for AYSL. Lombardo then, and the others mentioned had reached the stage set forth in the statute, of "having devised or intending to devise a scheme to defraud." Title 18, United States Code, Section 1343. *Buckner, supra*, cited by appellants, is not in point, because that case held that the mailings in question occurred prior to the scheme to defraud being born.

3. Fraudulent Prospectus Count

Lombardo relies on Aloï's Point II for this argument. The Government responds to this in our Subsection D at page 48, *infra*.

B. John Savino

Savino, another of the men-behind-the-scenes, was convicted of conspiracy (Count One) and of the use of a fraudulent offering circular (Count Eighteen). The evidence was sufficient to support these verdicts.

1. Conspiracy Count—Sufficiency

Savino argues that while the proof may show that he halted the AYSL deal until he was promised the repayment of a \$10,000 debt owed to him (and Pasquale Fusco), by Hellerman, there is no proof, either direct or circumstantial, that he knew that the AYSL deal was illegal or designed to defraud. This argument is without merit.

The evidence established that Savino and Fusco were members of a group headed by Vincent Aloï and Buster Aloï, and which included Ralph Lombardo. It was a hierarchical organization in which plans and procedures had to be cleared in advance with superiors. The evidence also showed that Savino and Fusco dealt with other people in-

volved in similar groups. An example of this was Savino and Fusco's \$10,000 investment in Hellerman's Trimatrix deal. They lost that investment. For reasons that will be explored shortly, Savino and Fusco believed that they were entitled to this \$10,000 back from Hellerman (Tr. 1733-35, 1737-41, 3468-70). Did they institute a civil suit against Hellerman for return of this \$10,000? No, they contacted their superiors, and eventually a "sit down" or meeting was had with Hellerman, his superior Dioguardi, and Savino and Fusco's superior Vincent Aloï. At the "sitdown", an agreement was struck whereby Hellerman became obligated to repay Fusco and Savino \$10,000 when financially able to do so (Tr. 1741-42).

Savino argues that there was nothing in the Trimatrix deal which would have alerted him that Hellerman's AYSL deal was unlawful. If it were true that Savino believed that Trimatrix was a legitimate deal and that he was making a legal \$10,000 investment, then why did he believe he was entitled to his money back from Hellerman. In legitimate investments, the investor is putting up risk capital; if the transaction is a success he receives a profitable return on his investment; if the transaction is unsuccessful, the investor stands to lose what he invested. There are no guarantees in legitimate risk investments. Yet Savino felt that Hellerman was obligated to return his investment. The inference is compelling that at least in Savino's mind, knowing Michael Hellerman as he did, he believed that Trimatrix was a swindle, protected by Dioguardi, and therefore he was entitled to his investment.*

* This conclusion is supported by the fact that earlier, Savino had told Moffit that Hellerman was "with Johnny Dio" thus implying his knowledge that Hellerman was protected by Johnny Dio (Tr. 3468). It is also noteworthy that for whatever reason Savino and Fusco decided to coverup the fact that they were involved in Trimatrix, by putting the stock in Savino's wife's name.

From Trimatrix then, Savino was on notice as to the type of deals engaged in by Hellerman, a contention strengthened by Savino's own actions. That he knew and believed Hellerman to be nothing but a swindler is evidenced by his comment to Graifer at the Skyway Motel. When told of Hellerman's involvement in AYSL by Graifer, Savino stated that Hellerman "was no god damn good and would swindle his own mother and father" (Tr. 512).

Furthermore, before Savino became involved in the AYSL deal he knew that Hellerman was to be paid \$45,000 under-the-table for taking care of the AYSL stock deal. In his brief Savino belittles the impact of his having known that the AYSL deal entailed Hellerman's receiving the \$45,000 payment, claiming that to be insufficient to inform him of the illegality of the deal. Specifically at the Skyway, Graifer told Savino that the AYSL deal was a public offering of corporate stock, he told Savino that Hellerman was going to be the person who was to sell the stock; and told him that he (Graifer) was going to pay Hellerman "\$45,000 under-the-table" for selling the stock. "Under-the-table" means in secret, not disclosed to the general public. The inference is compelling that such knowledge undoubtedly indicated to Savino that the AYSL public offering was another of Hellerman's swindles or at the very least, since there were secret payoffs involved in the deal, that it was a dishonest deal in which someone would be defrauded, since honest deals do not have secret payoffs. This had to have been confirmed in Savino's mind when Graifer told him that he was not worried how bad Hellerman was because:

"Buster Aloï had a conversation with Johnny Dio and Johnny Dio was standing good for Mike Hellerman's obligation and that Buster was to stand good for my obligation" (Tr. 497-98, 509-15).

After this meeting with Graifer, Savino and Fusco acted on the information provided by Graifer and in so doing proved he and Fusco had the power through Vincent Aloï to stop the deal and then, having been satisfied with the new terms, to permit it to start up again. Specifically, they went to Vincent Aloï and complained that Hellerman was going to get \$45,000 from the deal and that despite the guarantee from the Dioguardi-Aloï "sit down" they were not getting their \$10,000 back from Hellerman. Thereafter, acting on Fusco and Savino's complaint, Vincent Aloï temporarily halted the deal and only permitted it to start up after new terms had been set which satisfied Fusco and Savino, specifically, a guarantee to them that they would get their \$10,000 back from the deal, which of course they did.* Fusco and Savino also knew about the other new terms of the deal since they were present with Aloï, Dioguardi and Lombardo when the \$45,000 was allocated by Aloï, \$10,000 to them, \$10,000 to Lombardo and \$25,000 to Dioguardi (Tr. 518, 530, 532, 1836-37, 1868-74, 1912).

That Savino knew the AYSL deal was a fraud is confirmed by Hellerman. One week before the fraudulent closing Savino and Fusco went to see Hellerman at his office. There they inquired about the progress of the deal and pressed for the repayment of their \$10,000. The prosecutor posed the following question to Hellerman concerning this meeting with Fusco and Savino:

"Q. Did you have a conversation with them on the subject of the fraudulent offering of At-Your-Service-Leasing stock? A. Yes, I did, sir" (Tr. 1854).

* Savino confirmed that he had in fact gone to Vincent Aloï to stop the deal when he later told Hellerman:

"I had to do that Mike, because I had to protect my \$10,000" (Tr. 1912).

Hellerman testified that when Savino and Fusco came to his office they specifically asked how the closing was coming. Since they could only have learned about the closing from Lombardo, and since Lombardo knew it was an illegal closing (because he knew it was after the July 7th deadline and that the records would be backdated to cover this up) it is fairly inferable that he also told Fusco and Savino that it was illegal.

The following then are the principle points of evidence relating to Savino's participation in the conspiracy and specifically to his knowledge that the deal was a fraud.

- (1) Savino knew that Hellerman was a swindler.
- (2) Savino knew that Hellerman was getting paid \$45,000 under-the-table to take care of the At-Your-Service Leasing stock deal and to sell the stock.
- (3) Savino knew that Buster Aloï and Ralph Lombardo had arranged for Hellerman to do the AYSL deal, and that Johnny Dio was standing good for Hellerman, and Buster Aloï was standing good for Graifer and AYSL.
- (4) Savino knew that he could stop Hellerman's participation in the deal, by complaining to his (Savino's) superior, Vincent Aloï, who in turn exercised power over Hellerman through Hellerman's superior, John Dioguardi. (This was no normal business community.)
- (5) Savino exercised power over the deal by stopping it through Vincent Aloï and then approving its starting up again when he had been guaranteed \$10,000 from the under-the-table payoff.

- (6) One week before the fraudulent AYSL closing, Savino with Fusco, talked about "the fraudulent offering of AYSL stock" with Hellerman, specifically discussed the pending closing with him, and pressed Hellerman for his \$10,000 out of the proceeds.
- (7) Savino knew that the new terms for the deal also included payment of \$10,000 to Lombardo and \$25,000 to Dioguardi, as he was present when the money was divided up by Vincent Aloï and Dioguardi.

To contend that there was no proof Savino knew a fraud was involved is a sheer fantasy. Direct proof of knowledge is unnecessary.* Knowledge and intent may be inferred from all the surrounding circumstances. *United States v. Platt*, 182 F.2d 439, 471 (2d Cir. 1950); *Paschen v. United States*, 70 F.2d 491, 498 (7th Cir. 1934); *United States v. Kelley*, 186 F.2d 598 (7th Cir.), cert. denied, 341 U.S. 954 (1951). In this case the inferences to be drawn are inescapable. Savino knew the At-Your-Service Leasing stock deal was not an above-board venture executed by honest men.** In short, taking the view of the evidence most favorable to the Government, there is ample support for the jury's finding that Savino knew the deal was a fraud. Compare *United States v. Jacobs*, 475 F.2d 270, 280-81, 287-88 (2d Cir. 1973).

* Although direct proof of Savino's knowledge is supplied by his conversation with Hellerman about the "fraudulent" AYSL deal.

** In ruling that the case against Savino was sufficient to go to the jury, Judge Knapp stated in part:

"It is my belief that the Government has sufficient evidence to support their theory that there was an ongoing conspiracy which came to Fusco's and Savino's attention, they demonstrated their power to stop it, that they withheld that power, in the colloquialism, in exchange for being taken aboard" (Tr. 3626).

Accordingly, the proof complied with the test stated in *Ingram v. United States*, 360 U.S. 672 (1959) and *United States v. Gallishaw*, 428 F.2d 760 (2d Cir. 1970), in that Savino possessed the knowledge that he was involving himself in a fraudulent public offering of AYSL stock. His actions, in conjunction with Fusco, in halting the deal by interceding with Vincent Aloï set out his stake in the venture and his agreeing to having Hellerman's debt to him satisfied out of the proceeds of the AYSL deal was an act in furtherance of the scheme. Without Savino's agreement the deal was forever stopped, as he had already demonstrated that he had access to the man who ultimately stopped it and started it again, Vincent Aloï.

2. Conspiracy Count—Independent Evidence

Savino argues that there was insufficient nonhearsay evidence of his participation in the conspiracy. This claim is also without merit since the proof at trial complied with the standard set forth in *United States v. Calarco*, 424 F.2d 657, 660 (2d Cir. 1970) and *United States v. Geoney*, 417 F.2d 1116, 1120 (2d Cir. 1969) that a defendant be shown by a fair preponderance of the evidence independent of the hearsay utterances of co-conspirators to have been a member of the conspiracy. Contrary to Savino's assertion, there are considerably more than two conversations comprising the totality of the independent evidence.

Initially, Hellerman testified that Savino and Fusco had invested \$10,000 in the Trimatrix deal under the name Lorraine Savino, and that they had lost their investment (Tr. 1735, 1738, 1739). Then Graifer testified about his meeting with Savino and Fusco at the Skyway Motel, in which Graifer told them about the AYSL stock deal and Hellerman. Savino told Graifer that Hellerman owed Fusco and him \$10,000, and that Hellerman was a swindler. In Savino's presence, Fusco stated that they were going to see

Vincent Aloï about the situation (Tr. 497-98, 509-12). The next piece of independent evidence was Hellerman's testimony about his meeting with Savino and Fusco at his office one week before the closing. Savino and Fusco came to Hellerman's office, discussed the fraudulent AYSL offering, inquired about the closing and the progress of the deal, and pressed for their money from the proceeds (Tr. 1853-54).

All of the above evidence was omitted in Savino's "detailed analysis of the facts."

Next, but first as far as the analysis in Savino's brief, is Hellerman's testimony about his meeting with Savino after the \$45,000 had been distributed. This exchange constitutes an admission by Savino that the \$10,000 had been received as a result of his having gone to Vincent Aloï and having the deal stopped. The second piece of independent evidence mentioned by Savino in his brief (pages 49-50) is the 1971 telephone conversation between Graifer and Savino, when Savino again acknowledged that he had the AYSL deal stopped until the \$10,000 obligation was met.

The foregoing direct evidence clearly connects Savino by a fair preponderance to the conspiracy, both as to his knowledge about the type of deal AYSL was and about the actions taken by him to assure his stake in the venture. Compare, *United States v. D'Amato*, 493 F.2d 359 (2d Cir. 1974).

C. Vincent Aloï

Vincent Aloï was the top man in the hierarchical group with which Lombardo and Savino were associated. He was the son of Buster Aloï, the man to whom Graifer and Lombardo went to get the AYSL deal done. Aloï was convicted of conspiracy (Count One), wire fraud (Count Ten), and use of a fraudulent offering circular (Count Eighteen). The evidence was more than sufficient to sustain these verdicts.

1. Conspiracy Count—Sufficiency

Aloi contends that the proof was insufficient in that it failed to show that he had any intent to violate the securities law or even had any knowledge of the conspiracy charged. Aloi argues all that was proven was that he successfully obtained repayment of Hellerman's obligation to Savino and Fusco, but that there was no evidence that he knew the deal being done by Hellerman was anything but legitimate.

Aloi's position of power in this mosaic was revealed by Lombardo when Lombardo first told Hellerman of the AYSL scheme. In identifying and vouching for Graifer, Lombardo said that Graifer was "with" Buster and Vincent Aloi (Tr. 1753-54). It was to Vincent Aloi that Savino and Fusco turned when they learned of AYSL and Hellerman's involvement in return for a \$45,000 kickback. Lombardo confirmed this to Hellerman when he told Hellerman that the deal was stopped because Savino and Fusco had complained to Vincent Aloi (Tr. 1837), and that Aloi had ordered Lombardo to get back the \$22,500 up-front money previously forwarded to Hellerman (Tr. 1801-03). It was to Vincent Aloi that Graifer and Lombardo went running the day after Graifer's first appearance before the SEC, to complain that evidently Hellerman had swindled them out of much of the proceeds of the fraudulent AYSL offering (Tr. 598-605).

The Government submits that the jury was manifestly justified in drawing from the evidence adduced at trial, including Vincent Aloi's privileged position of power, the inference that Aloi knew that the AYSL public offering was fraudulent. Aloi knew Hellerman and the type of deals he engaged in. As Hellerman stated to Graifer and Kelsey at Longchamps: "[T]his is a small deal compared to other deals I have done, and you could check on Belmont and on Imperial on how I ran stocks. You know, you can check with Buster, you can check with Vinny [Aloi], Ralphie knows" (Tr. 1766). Aloi revealed this at the meeting with Fusco and

Hellerman at the Spindletop, when he told Hellerman "For once let's do something right; for once let's make sure my boys get their money back" (Tr. 1850). Aloï knew Hellerman from prior deals—it was Aloï who arbitrated the sit-down with Dioguardi when Hellerman's \$10,000 obligation to Savino and Fusco was established as a result of Trimatrix (Tr. 1741-42).

Moreover, the inference of Aloï's knowledge is compelled by the fact that he learned of the AYSL deal from his father, Buster Aloï (Tr. 520-23, 526, 1241-48). Buster knew that the AYSL offering was designed to defraud the public, and the jury would be clearly justified in inferring that when Buster called his son Vincent and told him of the problems that Graifer was encountering in the deal, he told his son Vincent what the deal was all about. Equally inferable is that when Fusco and Savino complained to Aloï that Hellerman was doing the AYSL deal and getting \$45,000 for it at a time when he was obligated to them for \$10,000, that they told Aloï that the deal was another of Hellerman's swindles. This inference is compelled by the fact that they told Aloï of the \$45,000 under-the-table kickback. Additionally, it is clear that Aloï kept himself informed of the progress of the deal after having dictated the new terms for starting it up again. An example of this is that he sent Lombardo to attend the fraudulent closing on July 28, 1970, Lombardo told Hellerman he was at the closing because "(he) just wanted to make sure everything was all right, wanted to be able to report back to Vinny (Aloï) how everything was going. He (Vincent Aloï) wanted to know what was going on" (Tr. 1860). Since Lombardo had the job of keeping Vincent Aloï informed about the deal it is fairly inferable that because Lombardo knew the July 28th closing was illegal, it having occurred three weeks after the July 7th deadline, Aloï was informed that it was illegal. Finally, of course, it was Vincent Aloï who received the \$45,000 payoff in cash from Lombardo and Vincent Aloï who allocated the money: \$10,000 to Fusco and Savino, \$10,000 to Lombardo and \$25,000 to Dioguardi.

Most importantly, it must be remembered that Aloï operated within the well-defined structure of the two hierarchical groups. Decisions had to be cleared with superiors, and only co-equal members of each group could deal with each other: Graifer-Hellerman, Vincent Aloï-Dioguardi. Once Aloï was brought into the picture, and he dictated the terms necessary to allow the deal to proceed, it was logical for the jury to infer that before he could set those terms, he would make sure to have his underlings inform him as to the nature of the deal. And since he had to sit down with Dioguardi, who as Hellerman's protector knew what the deal was all about, Aloï would similarly have had to make sure he knew exactly what kind of deal the AYSL offering was. Aloï continued to be in contact with Dioguardi about the progress of the deal even after the initial offering had been completed. This was demonstrated when Graifer said that Aloï told him at Tamcrest he would talk to Dioguardi about the fact that Hellerman had actually sold more than 50,000 shares of the AYSL stock.

Aloï's role as kingpin of the scheme cannot be denied. Aloï entered the conspiracy when he authored the new terms on which Hellerman could do the deal, and "sat down" with Dioguardi to guarantee the terms and put them "on record" (Tr. 532-34, 1829-32, 1836-36, 1840-42). Aloï continued to maintain interest in the scheme, as exemplified by his inquiries to Hellerman at the Spindletop (Tr. 1846-50), and by his sending Lombardo to the closing as his representative (Tr. 1860). Once the closing occurred and the \$45,000 in cash was obtained, Aloï lived up to his top position and doled out the under-the-table kickback from the proceeds of the fraud, in conformity with the terms he had dictated (Tr. 567-68, 570, 1868-74).

The evidence, when taken as a whole, and when given all natural inferences arising therefrom, clearly shows that Aloï not only knew that AYSL was a fraudulent offering,

but that once he was in the picture, Aloï, from his insulated position of power, ordered that the deal go through under the terms dictated by him, kept in touch with the progress of the deal, divided up the proceeds when the deal was completed, and later continued to work out problems as they arose.

2. Conspiracy—Single or Multiple Conspiracy

Aloï argues that the evidence demonstrated the existence of multiple conspiracies. This claim is patently without merit.

The Government proved one overall agreement among the various parties to carry out the ultimate objective—the fraudulent public offering of AYSL stock. The fact that the conspiracy continued over a period of time does not cause it to become a multiple conspiracy. *Braverman v. United States*, 317 U.S. 49, 52 (1942). Nor does a change in the makeup of the participants mean that a single conspiracy does not exist. *United States v. Stromberg*, 268 F.2d 256, 263-64 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). The fact that Aloï came into the picture after the conspiracy had already been conceived does not create a second conspiracy since he acted to bring about the same ultimate objective. *United States v. Kessler*, 449 F.2d 1315, 1318 (2d Cir. 1971).

The conspiracy to offer fraudulently AYSL stock to the public was initially conceived by Graifer, in conjunction with the accountants, who then broached the subject to Lombardo, who took Graifer to see Buster Aloï. At Buster Aloï's suggestion, Lombardo contacted Hellerman actually to do the deal, and the arrangements were confirmed by Buster Aloï on behalf of Graifer and Lombardo, and Dioguardi on behalf of Hellerman. The conspiracy continued along until Savino and Fusco learned of it and temporarily halted it by complaining to Vincent Aloï. When Aloï

dictated new terms of Hellerman's participation, the deal continued. The objective remained constant: fraudulently to offer AYSL stock to the public. That is what must be shown to prove a single conspiracy, and that is what the Government proved to the jury. *United States v. Projan-sky*, 465 F.2d 123, 135 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972).

The fact that co-conspirators may participate in a conspiracy for various personal motives and reasons, and the fact that a conspiracy itself may contain multiple agreements among the participants does not create multiple conspiracies if the various agreements are tied together as stages in the formation of the larger, all-inclusive combination having the same ultimate, unlawful objective. *Blumenthal v. United States*, 332 U.S. 539 (1947). What was stated in *United States v. Kellerman*, 431 F.2d 319, 323 (2d Cir.), *cert. denied*, 400 U.S. 957 (1970), 401 U.S. 909 (1971), is just as valid here:

"It is true that each defendant may not have been present on every occasion and each may have had a somewhat different role but the thread of continuity was as visible as Ariadne's thread which led Theseus safely through the Cretan labyrinth after his Minotaur adventure."

3. Wire Fraud

Aloi's conviction of wire fraud (Count Ten) is based on the telephone call to him from his father, Buster Aloi, at the time when Graifer had gone to Florida to see Buster to complain that Vincent Aloi had stopped the AYSL deal as a result of Fusco and Savino's intercession with Vincent Aloi. Aloi argues that the evidence to support the conviction was insufficient, and that the judge's charge failed to define the crime.*

* The issue with respect to the judge's charge is treated elsewhere on this brief, in Point II, *infra*.

Aloi argues that there was no proof that it was Vincent Aloi whom Buster Aloi called. This contention again ignores the material inferences which flow from the totality of the evidence: Graifer went to see Buster Aloi to complain that his son Vincent had stopped the deal; Buster told Graifer that he, Buster, would call his son, Vincent Aloi, and we (Buster and Vincent) would get it all straightened out; indeed, Buster had Graifer dial Vincent Aloi's telephone number in Suffern, New York (Buster gave Graifer the number) and Buster spoke and asked for his son. After the conversation in Italian, Buster told Graifer that he had spoken with his son, and everything would be straightened out (Tr. 520-23, 526, 1241-48). Of course, Vincent Aloi thereafter did straighten everything out.

Aloi further argues that there is no proof of the content of the conversation. Concededly there is no direct proof, since Graifer did not understand Italian. But, the circumstantial evidence is overwhelming, and circumstantial evidence is sufficient to support a conviction both as to the identity of the participants and as to the content of the telephone call. *United States v. Zweig*, 467 F.2d 1217, 1220 (7th Cir. 1972), *cert. denied*, 409 U.S. 1111 (1973). The evidence as set forth hereinabove justifies the jury's verdict on Count Ten that the Buster Aloi-Vincent Aloi telephone call was for the purpose of reinstating the fraudulent AYSL public offering.

* Aloi also ignores what occurred at Tamcrest Country Club on September 17, 1970. That was when Graifer met Vincent Aloi, the meeting having been set up at Vincent Aloi's request after Graifer had contacted Lombardo, the purpose being for Aloi to be informed of what Graifer had learned the day before at the SEC. During this meeting, Graifer remarked to Aloi that he, Graifer, had tried to call Aloi the night before at Aloi's house, since he still had the telephone number that Buster had previously given him. Aloi told Graifer to "destroy the number," and that he never wanted Graifer to call him at his house (Tr. 598-605). This constitutes a tacit acknowledgement by Vincent Aloi that it was he with whom Buster had spoken.

D. Count Eighteen

All the appellants argue that their convictions for the use of a false and misleading offering circular cannot stand.* The AYSL offering circular was prepared by Andrew Nelson (with the assistance of Miller and the accountants) and filed with the S.E.C. prior to the effective date of the offering and prior to the time when Graifer and Lombardo initially approached Hellerman to see if he could help in taking AYSL public. It was this offering circular, naming TDA as the underwriter, which the jury found was used in connection with the AYSL offering in violation of Title 17, C.F.R., Section 230.256(e) (and Title 15, United States Code, Section 778(a)) which provides in relevant part that "[I]n no event shall an offering circular be used which is false or misleading in light of the circumstances then existing."

Appellants argue first that there were no *material* misrepresentations in the offering circular. This point is frivolous. There were material misrepresentations in the circular as it was originally prepared by Nelson, Miller and the accountants, and then additional material misrepresentations as the "existing circumstances" changed after Hellerman came on board. Count 18 lists four material misrepresentations, two from the pre-Hellerman stage and two more after-Hellerman. The original offering circular as regards the pre-Hellerman stage, although disclosing AYSL's weak financial condition, (1) failed to state that \$10,000 of the proceeds of the offering would be paid to Nelson's company, Tech-Ec and (2) did not disclose that TDA was listed as underwriter in name only and never intended to fulfill the normal underwriter's function of selling or even attempting to sell the stock. Both of

* The appellants' argument is set forth in Alois's Point II. That part of appellants' argument dealing with the trial judge's charge is contained in DiGuardi's brief, Point II, and is responded to in the Government's Point III, *infra*.

these misrepresentations are clearly material. First, it was material that Nelson's company, Tech-Ec, was taking an additional \$10,000 fee for its role as consultant in the offering out of the proceeds coming to AYSL which (less commissions to TDA) were only \$127,500. Second, the fact that TDA had no intention of selling stock as an underwriter normally does was obviously material. Surely the S.E.C. and anyone interested in the stock would have thought it material that in fact there was no one in the pre-Hellerman stage, not even the apparent underwriter, with the possible exception of Graifer, who had any hope or intention of selling the offering (Tr. 2704, 3180-83).

In the after-Hellerman stage, the additional omissions and misrepresentations "in the light of the circumstances then existing" are material in even more critical respects. Any prospective investor and SEC examiner would certainly deem it material that Michael Hellerman, a notorious stock swindler previously barred from the securities' industry, was going to serve in fact as the seller or underwriter of the offering. Similarly, the fact that \$45,000, or more than one-third of the total proceeds due to the company from the minimum part of the offering, would be paid as an under-the-table payoff for Hellerman's role in the offering, to Vincent Aloï for allocation to Lombardo, Fusco and Savino and Dioguardi (a twice convicted felon) was obviously material as well.

On the failure to disclose the \$45,000 payoff appellants make the argument (Aloï's brief, page 26), that in essence the \$45,000 was disclosed since the original offering circular stated that the proceeds would be used to pay off "existing debts". In fact the offering circular says no such thing. The "Use of Proceeds" section on page 5 of the offering circular (page 50 of Appellant's Appendix) reads as follows: "\$114,500 (of the proceeds shall be used) for the repayment of unsecured demand notes bearing 10% interest which are held by persons unrelated to the company." By

no stretch of the imagination could this reference to specific loans personally guaranteed by the accountants (Tr. 400) cover the \$45,000 under-the-table payoff to Hellerman and Aloï, et al. It is clear in short that both in the pre-Hellerman and after Hellerman stages, the AYSL offering circular was "false or misleading" in "the light of the circumstances" existing at the time, and furthermore, that the circular was "false and misleading" in the material respects described in the indictment and proved at trial.*

Next, appellants argue that there was no *wilful* misrepresentation or omission in the offering circular. Again the point is without merit. Contrary to appellants' assertion, the jury could well have properly found that the misrepresentations in the offering circular, both those before-Hellerman came into the picture and the additional ones thereafter were wilful. From the pre-Hellerman stage the failure to state that Nelson's company was to receive \$10,000 out of the proceeds from the offering could well have been found by the jury, despite Nelson's testimony, to have been a wilful omission and surely the second misrepresentation, namely, that TDA was listed as underwriter in name only with no intention of fulfilling the responsibility of an underwriter to sell the stock, was a wilful effort to cover up the fact that at the outset there was no one who intended to sell the stock (Tr. 2704, 3180-83). In the after-Hellerman stage the failure to disclose his role as, in

* Other pre-Hellerman misrepresentations in the circular listed in Count One, paragraph 19(n) could also have been found by the jury to have been material. These were (1) the circular did not state that the accountants themselves were personally liable on AYSL's loans which were to be repaid out of the proceeds and (2) the circular did not state that TDA got a \$2,500 advance payment paid not by AYSL but by the accountants personally before it agreed to have its name on the circular. The jury in finding guilt on Count 18 was not required to consider only those material misrepresentations specifically listed in Count 18, but could as well have found others (from Count One).

effect, the underwriter, and the failure to disclose the \$45,000 payoff, were obviously wilful.*

Appellants next contend that there was a variance between the proof and the indictment, in that the proof did not show any "use" of the offering circular. Appellants argue that the offering circulars were not used since the jury could not have found proof that they were ever sent to purchasers. That assertion is factually erroneous and furthermore, the offering circulars were "used" as well, in other ways than being mailed to purchasers.

There was clear circumstantial evidence that the offering circulars were sent to purchasers of AYSL stock. Hellerman testified that he explained to Lombardo and Dioguardi how he was going to sell the stock, even though the legal period had expired. He said he explained to them that the confirmation slips would be back-dated to reflect a transaction prior to July 7, 1970, and that he would then send an offering circular with the confirmation slips to the persons buying the stock (Tr. 1842). Shortly thereafter Hellerman sold much of the stock himself to various individuals,** and had others sell it for him,*** by using buy

* The above assumes that the wilfulness requirement relates to the making of the misrepresentation in the offering circular, or in the language of 17 C.F.R. § 230.256(e) to the failure to keep the offering circular accurate as to the circumstances "existing" at a given time. If the wilfulness aspect relates instead, or as well, to the "use" of the false offering circular, that requirement is met since the use of the false circular by the conspirators was clearly intentional and wilful. For example, at the time Hellerman mailed the offering circulars to purchasers of stock he knew that the circular was false since it contained the misrepresentations or omissions with respect to "the circumstances then existing" discussed above.

** To Arthur Sommers, Tony Cardinale, George Silverfein, Louis Alou, Ann Messing, Joel Goldfarb, Martin Roth and Louis Asher, none of whom testified (Tr. 1850-52).

*** Harry Parsons who sold between 14,000 and 15,000 shares, and who did not testify (Tr. 1852).

and sell confirmations which guaranteed the purchasers a 2½ point profit (Tr. 1846, 1850-52). Since Hellerman had already explained that as he sold the stock he mailed offering circulars and confirmations together to the individual buyers, it follows that the jury could have reasonably inferred that Hellerman sent (or gave) the offering circulars to his purchasers, and to Harry Parsons, who lined up a number of purchasers for Hellerman for distribution to his customers (Tr. 1852). The circular was used in other ways as well. After it was originally prepared by Nelson (with the assistance of Miller and the accountants) it was filed with the SEC (GX 1) and clearly was used to meet the SEC requirement that there be an offering circular prepared and filed publicly with the SEC for all such stock offerings as this one during the period of the offering (Tr. 254-274). 17 C.F.R. Section 230.256 requires that four copies of the offering circular be filed with the SEC at the commencement of the offering. That circular stays with the file at the SEC during the offering (See Title 17, C.F.R. § 230.255). Therefore, at the time of the initial filing, in view of the pre-Hellerman misrepresentations a violation existed and, of course, when the circumstances changed and Hellerman in fact became the underwriter with the condition of the \$45,000 payoff, under Title 17, C.F.R. Section 230.256(e), the circular became false and misleading in light of the circumstances existing at *that* time, yet it continued to be used in the sense that it met the filing requirement of the SEC.

Thereafter, the circular continued to be used by the conspirators in various ways. Nelson carried the circulars out to TDA's office and showed them to Dragani and Fisher who held them at TDA to be mailed with a buy confirmation to any purchasers of stock. Fisher testified that there were three purchasers who actually sent in checks in May within the legal period and it is inferable in view of TDA's practice that they were sent an offering circular (Tr. 3187-89). Hellerman testified that when Lombardo came to him

with the deal Lombardo had a copy of the offering circular which he showed him in an effort to interest him in helping sell the stock (Tr. 1752). Subsequently, after Hellerman came into the picture (and after the deal had been stopped and started again by Vincent Aloï and Fusco and Savino), lists of buyers were drawn up, the circulars were packed by Fisher at TDA together with confirmations into envelopes and delivered to Nelson with the intent that they would be mailed to the subscribers named (Tr. 3189). Nelson, however, apparently did not mail them but delivered the envelopes with the circulars to Hellerman (Tr. 3190).

Therefore, the jury, having found a substantive violation in the use of the false offering circular, logically would also have found under *Pinkerton* that the use of the circular was by a co-conspirator of the defendants on trial, and in furtherance of the conspiracy, and that each defendant on trial was in fact a member of the conspiracy at a time when the circular was "used" and was "false and misleading in light of the circumstances then existing." *

Appellants lastly argue that because the legal period for selling AYSL stock had expired by the time the offering circular was allegedly used, there could be no illegal use of the circular since it was *per se* illegal even to sell the unregistered stock. Their argument is that since there is no reporting provision required for unregistered, unexempt stock, no statute could have been violated by using a false offering circular in connection with such stock. Appellants offer no authority for this circular reasoning. If sustained,

* Appellants also argue that the offering circulars were not "used" because the sale of AYSL stock did not depend on the use of the circular but rather on Hellerman's machinations. However, they cite no case in support of their contention that the only meaning of the verb "to use" intended in § 230.256(e) is use in the sense to rely on. See e.g. *Demarco v. Edens*, 390 F.2d 836, 841 (2d Cir. 1968), no proof, no reliance required for violation of 17, U.S.C. § 77(1)2(2).

such argument would enable a person to compound his initial illegal act by further illegalities, since the initial crime would allegedly moot further crimes.* Accordingly, reason and logic dictate that when a fraudulent circular is undeniably used at a time when the public has no reason to believe that there is illegality involved in both the offering and the offering circular, a violation of 17 C.F.R. § 230.256 (e) is made out.**

POINT II

Appellants' failure to object below bars their claims of error with respect to the charge. In any event, the claims are without merit and certainly do not constitute plain error.

Appellants allege that certain defects in the court's charge require reversal. This argument should be rejected. First, not only did appellants fail to make timely objections to the charge on the grounds presently assigned as error, they failed to do so after having been given a written

* It is as if the appellants are suggesting that a person who files a false income tax return after the April 15th deadline can only be charged with late filing and not the false return. Obviously, the purpose of the requirement that an offering circular be prepared and on file at the SEC is so that one is available to persons involved in the selling of the stock, to prospective purchasers and to the public through the S.E.C. file. As far as the public was concerned, the stock was still being sold, albeit illegally, after July 7, 1970 and the public is entitled to be protected at that time as well as before.

** Even if the conviction on Count 18 were reversed on the basis of legal impossibility, such impossibility is not a defense to a charge of conspiring to violate such statute and the conspiracy conviction would therefore remain. *United States v. Jacobs*, 475 F.2d 270, 282 n. 27 (2d Cir. 1973).

Aloi's, Point II (5) pp. 31-33 of his brief, on Judge Knapp's charge is dealt with in Point II, above.

copy of the trial court's charge in a prior securities fraud case which they were told would form the basis for the charge in the instant case. Second, the charge represented an extremely fine and legally correct attempt to explain to the jury, in language appropriate to laymen, what the governing legal principles were without encumbering them with prolonged exposition of issues which were of marginal importance to the disputed issues at trial. To the extent that there was any error in the charge within the dictates of the prior decisional law, such errors did not in the remotest degree deprive the defendants of any substantial rights such as would rise anywhere close to the level of "plain error."

A. The Failure of Defense Counsel to Object to the Charge

On the morning of December 10, 1973, eleven days prior to the delivery of the charge, Judge Knapp advised counsel that he would charge the jury on the substantive counts in essentially the same manner as he had charged in the so-called Soldano case.* He told them that they were of course free to except to the use of that charge and he particularly drew their attention to his intention of telling the jury what facts it had to find to find guilt on the substantive counts without separately listing the terms of the law (Tr. 3655, 3656). Thereafter, he gave a written copy of the Soldano charge to defense counsel (Tr. 3664). No claim is made on this appeal that Judge Knapp was even requested to modify his intended charge in the respects presently claimed to have been erroneous. After the charge had been delivered, the exceptions were few and trivial and none was directed at inadequacies in stat-

* *United States v. Soldano, et al.*, 71 Cr. 558, affirmed without opinion *sub nom. United States v. Greenberg*, Dkt. No. 72-2368 (2d Cir. 1973).

ing or defining the elements of the offenses set forth in the indictment.*

Now on appeal, a barrage of objections, none of which was made below, has been aimed at the charge. The errors it is earnestly claimed are of such moment, that the plain error rule must be invoked to reverse appellants' convictions despite their prior silence, indeed acquiescence, and despite the dictates of Rule 30, F.R.Cr.P. The Government respectfully submits that to permit the invocation of the plain error rule under the present circumstances would seriously erode the underlying policy of Rule 30 and permit extremely able and experienced defense counsel, as in the present case, to sit back in apparent satisfaction with the court's legal instructions, only to emerge indignantly on appeal. As this court has recently emphasized, the plain error rule is not a replacement for the responsibilities of trial counsel. *United States v. Counts*, 471 F.2d 422, 426 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *Dichner v. United States*, 348 F.2d 167 (1st Cir. 1965). In the present case the lack of timely objection below must be deemed an even higher barrier than otherwise since the trial court gave defense counsel a written prototype of his proposed approach substantially in advance of the charge and he highlighted the precise format now claimed to warrant reversal. It is submitted that when the charge is viewed as a whole, no fundamental error resulting in any substantial injustice will be found.

* For example, counsel for Aloï merely requested that two or three points be charged in the language of his requests. The Court was satisfied and the record so reflects that these points were adequately covered in its own charge (Tr. 5503-04). Counsel for Dioguardi followed the same course. He asked the Court to use the language of his requests on such issues as participation in a conspiracy ("mere presence and guilty knowledge"), accomplice testimony, and credibility of a defendant who testifies as a witness (Tr. 5505-06). Counsel for Lombardo asked that the Court additionally charge that if the jury finds any defendant guilty of conspiracy it need not find that defendant guilty of the substantive counts (Tr. 5507). The Court acceded to this request and so charged (Tr. 5514-16).

United States v. Sutherland, 463 F.2d 641 (5th Cir.), cert. denied, 409 U.S. 1078 (1972).

B. There Was No Plain Error in the Charge

The principal claims of error* with respect to the charge are (1) that it failed to properly define the objects of the conspiracy under Count 1;** (2) that it failed to include a requirement that the jury find willfulness with respect to the use of a false offering circular under Count 18 by, among others, a co-defendant who had pleaded guilty, testified for the Government and wholly admitted his role in the fraud;*** and (3) that it failed to charge the essential elements of wire fraud under Counts 9 and 10.**** These claims of error should be rejected.

Each of the appellants was convicted on Count 1 for conspiracy to violate designated sections of the securities law. The conspiracy charge was detailed and followed a familiar pattern (Tr. 5489-5494). Of particular importance are the emphatic terms used by the Court to stress the elements of knowledge and willfulness.***** The Court

* The Dioguardi brief focuses on Counts 1, 9 and 18. The Alois brief deals with Counts 1, 10 and to a lesser extent, Count 18. Each of the Appellants' briefs incorporates by reference the arguments of the others as relevant pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure.

** The objectives of the conspiracy were violations of 15 U.S.C. §§ 77q(a), 77s, 77x and regulations listed thereunder.

*** Count 18 charged a violation of 15 U.S.C. §§ 77s, 77x and 17 C.F.R. 230.256.

**** 18 U.S.C. § 1343.

***** "... What is necessary, however, is that they know of the existence of the common undertaking, are aware of its unlawful purpose and intend to further that particular unlawful purpose.

"You can't stumble into a conspiracy by mistake. A person can't be guilty of a conspiracy just because he associates with others who happen to be so guilty. He can be guilty of conspiracy only if he knows a common undertaking is afoot, if he knows that such a common undertaking has a particular unlawful purpose and if he willfully and intentionally decides to join in the undertaking for the purpose of furthering that unlawful purpose" (Tr. 5491).

at the outset stated the object of the unlawful conspiracy in general terms (Tr. 5492). This method of proceeding was certainly appropriate in that the objects of the conspiracy were also charged as substantive offenses and the Court subsequently gave a satisfactory exposition of the elements of these substantive counts when they were considered.*

Turning first to Count 18 which alleged the use of a false and misleading offering circular in connection with the sale of the AYSL stock, the Court summarized the allegations set forth in the indictment (Tr. 5495). It is true that the Court did not read verbatim from the indictment. But such a procedure is neither required nor is it to be preferred where issues are many and involved. In any event, a copy of the indictment was given to the jury by the Court at the start of their deliberations (Tr. 5516).

The Court specifically discussed two of the alleged omissions of material fact, i.e., "that Hellerman was involved in the deal and that some \$45,000 would be siphoned off to the . . . defendants" (Tr. 5495), and took note that these and the other alleged omissions had already been discussed at length during the trial and in the course of the just completed summations. There can be no doubt but that the jury was fully familiar with the alleged omissions of material fact. Furthermore the text of the indictment, which the jury had, listed the alleged omissions of material facts. The Court then gave a succinct statement of the applicable law, underlying this substantive

* Counts 2-8 alleged violations of 15 U.S.C. §§ 77(q)(a), 77x, and 18 U.S.C. § 2. Count 18 alleged a violation of 15 U.S.C. §§ 77s, 77x, 17 C.F.R. § 230.256, and 18 U.S.C. § 2.

charge.* It is respectfully submitted that the Court's statement of the elements of this substantive offense served to adequately define the first object of the conspiracy.

Likewise, the Court gave a simple and easily understood statement of the elements involved in the substantive counts for stock fraud ** (Counts 2-8), the second object of the conspiracy. Section 77q of the Securities Act of 1933 makes it an offense for anyone by use of the mail (among other instrumentalities) to employ a scheme to defraud, to obtain money by means of an untrue statement or omission of material fact, or to engage in any practice which operates or would operate as a fraud or deceit upon the purchaser. These substantive counts of the indictment involved the mailing of seven confirmations to purchasers of the AYSL stock. The Court explained what elements of the offense had to be proven in a straight-

* "I advise you as a matter of law if you find that this circular did fail to make the disclosures mentioned in the indictment and that if such disclosures would in your judgment have been of material interest to a purchaser of the securities, the issuance of the prospectus would have violated the securities laws of the United States" (Tr. 5495). This portion of the charge clearly refutes the claim that Judge Knapp failed to advise the jury on the meaning of materiality. In addition, the cases cited by appellants for the proposition that a charge of this nature (which instructs the jury as to the facts which must be found but not the specific terms of the statute) is plain error have been specifically disapproved by this Court. *United States v. Center Veal & Beef Co.*, 162 F.2d 766, 771 (2d Cir. 1947) (Hand, J.); *United States v. Capitol Meats, Inc.*, 166 F.2d 537, 539 (2d Cir.), *cert. denied*, 334 U.S. 812 (1948).

** The fact that the Court referred to the alleged offense as being one for *mail* fraud rather than *stock* fraud is of little moment. Obviously, it was not essential to advise the jury of the generally accepted labels for the offenses charged. As the Court itself noted, the jury had not been convened to hear a lecture on statutory law (Tr. 5499). For its deliberations the jury needed to know what the required findings were for guilt, not what the statute was called.

forward and complete manner.* It cannot seriously be contended that the jury was left ignorant of what the scheme to defraud was. The Court had only moments before given a detailed account of the fraudulent scheme as claimed by the Government (Tr. 5486-5490). What is more, the Court in explaining these stock fraud counts, specifically referred to "the scheme to perpetrate fraud on the public which is alleged in the indictment" (Tr. 5496). And as noted before, the indictment was made available to and was in fact given to the jury. Thus, the second object of the conspiracy—stock fraud—was also fully described. In sum, the jury was fully intructed on both objects of the conspiracy.

The defendants' second principle claim of error in the charge relates to Count 18. On that count each of the defendants charged in the indictment was convicted on a theory of vicarious liability under *Pinkerton v. United States*, 328 U.S. 640 (1946).** Since the jury found these defendants guilty of conspiracy, it could then determine that they were "partners in crime" with respect to the substantive counts. The Court gave a general statement of the *Pinkerton* theory of liability early in the charge before discussing any of the substantive counts (Tr. 5493-94). In discussing Count 18, the Court once again stated the essential elements to be proved to find liability under *Pinkerton* *** (Tr. 5495). Finally, in response to the re-

* "I advise you as a matter of law that if you find these confirmations were in fact placed in the mail and that they were in fact placed there as part of the scheme to perpetuate fraud on the public which is alleged in the indictment, such use for that purpose would constitute a crime against the United States" (Tr. 5496).

** The indictment also charged them as aiders and abettors.

*** "I further advise you, if you find the issuance of the circular was in furtherance of the conspiracy and in the reasonable contemplation of the contemplation [sic] of the conspirators you may find any defendant whom you may have found guilty of conspiracy, to be also guilty of the crime of issuing the false financial statement alleged in Count 18 of the indictment" (Tr. 5495).

quest by counsel for Lombardo, Judge Knapp restated the general requirements of *Pinkerton* liability and emphasized the distinction between the conspiracy count and the substantive counts (Tr. 3515-16).

The nub of the defendants' claim with respect to Count 18 appears to be that the Court failed to explicitly advise the jury that it must first find that some defendant—in this instance either Andrew Nelson, or the principals of TDA, and AYSL—willfully committed the substantive offense.* Thus, it is claimed, the defendants could possibly have been convicted of this substantive count on a theory of vicarious liability without the jury having given any consideration to whether or not Nelson or another co-conspirator willfully committed the offense. Given the evidence presented at trial, this possibility is so far fetched as to warrant little consideration. Nelson testified at length how he failed to amend the offering circular to include the material facts set forth in Count 18 of the indictment.

By the time he testified he had already pleaded guilty and he so advised the jury. He stated that he knew that Hellerman was in fact going to act as the underwriter for the AYSL offering (Tr. 2778), and also that TDA was underwriter in name only, whose services would be needed only to take care of the paper work (Tr. 2704). He further conceded that he was made aware that \$45,000 of the proceeds from the offering would be paid "under the table" to Hellerman (Tr. 2807). He certainly knew

* Appellants (see Alois's brief, p. 31) also contend that the judge's choice of the word "issuance" rather than "use" in referring to the offering circular constitutes plain error. This argument is meritless. There is nothing in the judge's charge which indicates that his choice of the word "issuance" referred to April 8, 1970, the date that the offering became effective. Indeed, the whole context of the charge makes clear that the judge was talking about issuance of the offering circular to prospective purchasers of AYSL stock; in other words, he was employing "issuance" synonymously with "use".

that \$10,000 from the proceeds would be used to pay one-half of his fee as the management consultant to AYSL in the offering.

Under these circumstances the Government submits that the failure specifically to charge the jury that Nelson had acted wilfully in the use of the offering circular was not error. Alternatively, it is submitted that if there was error, it was not plain error. Under the *Pinkerton* theory of criminal liability a defendant may be held responsible for acts committed by his agents and co-conspirators in furtherance of the conspiracy even if he has no specific knowledge of the particular act and no specific intent with respect to the detailed procedures used to carry out the common criminal purpose.

"The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all." *United States v. Pinkerton, supra*, 328 U.S. at 647.

Since the court thoroughly charged the jury with respect to appellants' willfulness on the conspiracy count on which they were all convicted, the question arises whether that willfulness may suffice to hold appellants criminally liable for the acts of Nelson. The answer to that question would appear to be in the affirmative. The law is well established that a defendant may be criminally liable for the acts which he causes to be done through a wholly innocent intermediary. *United States v. Bryan*, 483 F.2d 88, 92

(3rd Cir. 1973) (en banc); *United States v. Lester*, 363 F.2d 68, 72-73 (6th Cir. 1966), *cert. denied*, 385 U.S. 1002, *reh. denied*, 386 U.S. 938 (1967); *United States v. Weiss-credit Banca Com. E D'Invest*, 325 F. Supp. 1384 (S.D. N.Y. 1971) (Wyatt, J.); *United States v. Barr*, 295 F. Supp. 889 (S.D.N.Y. 1969) (Weinfeld, J.). Thus it is clear that even if Nelson had not acted wilfully, appellants would be responsible for his substantive crime which they caused.

Even if it were held, however, that it was necessary for the Government to have proved the willfulness of the actual actor, Nelson, the failure to so instruct the jury would not be plain error where Nelson's willfulness was apparent from his testimony as a Government witness who testified to his own criminal conduct and his plea of guilty to substantive charges under Sections 77s and 77x of the securities acts as well as to conspiracy. *United States v. Umans*, 368 F.2d 725, 728 (2d Cir. 1966). ("The jury knew the agents had the required criminal intent from the agents' own testimony.")* *United States v. Capitol Meats, Inc.*, 166 F.2d 537, 539 (2d Cir.), *cert. denied*, 334

* *Umans* specifically distinguishes appellants' principal authority *United States v. Byrd*, 352 F.2d 570 (2d Cir. 1965) where, the defendant, an IRS employee, was alleged to have received an unlawful fee for the performance of his official duties. There, the defendant was charged directly with the offense, not as an aider and abettor nor as a co-conspirator subject to *Pinkerton* liability. The charge was found deficient because it left out, completely the element of criminal intent in its emphatic summary of the essential elements. *Id.* at 573-74

U.S. 812 (1948).^{*} See also, *United States v. Private Brands, Inc.*, 250 F.2d 554, 557 (2d Cir. 1957), *cert. denied*, 355 U.S. 957 (1958).^{**}

^{*} In *United States v. Capitol Meats, Inc.*, *supra*, the defendants were charged with and convicted for willfully and knowingly making sales of meat above ceiling prices established by price regulations. Although no exceptions were taken by the defendants in the trial court they appealed on the sufficiency of the charge to the jury. It was claimed that it was plain error for the District Judge to fail to instruct the jury that the over-ceiling price sales to be criminal must have been made "willfully." The Government had offered testimony by purchasers that they paid cash in addition to that stated on the invoices. The defendants denied that any such payments were made or received. The Court found that under these circumstances the failure to charge willfulness was not fatal. "To have charged that if [the defendants] did [take additional cash], they did it 'knowingly', that is 'willfully,' would have stated what every juror would have known without being told." *Id.* at 539.

^{**} Appellants' remaining authorities are also inapposite. In *United States v. Ausmeier*, 152 F.2d 349 (2d Cir. 1945) the defendants were charged with a conspiracy to make false statements, *known by them to be false*, in violation of the Alien Registration Act. The Court failed to charge in the most unmistakable terms on the issue of *knowledge* of falsity. The reviewing Court felt that in the circumstances of that case, involving as it did members of the German Nazi Party who were not prone to question superior authorities, the issue of knowledge of the falsity of the statements was crucial. Judge Frank wrote for the Court: "Had the instructions clearly apprised them that they must pass upon that issue, we think that, having in mind the authority-loving character of many modern Germans, and particularly of Nazis the jurors could reasonably have believed that these defendants accepted as truthful the answers suggested to them by Drager, a German official. We may dislike Teutonic veneration of officialdom, but it is not criminal." *Id.* at 357.

United States v. Robertson, 298 F.2d 739 (2d Cir. 1962) is a case where it appears the Government did not seriously contest the insufficiency of the charge with respect to willfulness. *Id.* at 742. The defendant's claim of error was directed only to those counts

[Footnote continued on following page]

The third principal deficiency claimed to be present in the charge is a failure to properly define the elements of wire fraud.* The defendants' present complaint with respect to these two substantive counts is somewhat surprising in that the Court's insistence on charging only a *Pinkerton* theory of liability was, if anything, prejudicial to the Government. The District Court in no uncertain terms and at three separate points in its charge directed the jury to acquit the defendants on the substantive counts if it failed to find them guilty of conspiracy (Tr. 5493-94, 5502, 5515). Yet the evidence was clear and plentiful to boot, that Aloï, Dioguardi, and Lombardo participated directly in the phone calls of which each was convicted. Now, not having protested at the trial before the jury began its deliberations, they claim that they, not the Gov-

alleging violations of Section 77(e) of the Securities Act, not those charging violations of Section 77q(a). It does not appear from the Circuit Court's opinion whether or in what manner "willfulness" was charged by the District Court with respect to Section 77q(a).

In *United States v. Krosky*, 418 F.2d 65 (6th Cir. 1969), a prosecution for "unlawfully, willfully and knowingly" failing to report for induction, the Sixth Circuit, in a 2½ page opinion by a district judge found that the trial court failed to adequately explain to the jury the meaning of the word "willfulness." In view of the charge actually given ("There must be a specific wrongful intent. An actual knowledge of the existence of an obligation and a wrongful intent to evade it is of the essence." *Id.* at 66-67), it is difficult to reconcile the Circuit Court's holding of plain error. Finally, *United States v. Gillilan*, 288 F.2d 796 (2d Cir. 1961) merely holds that when a defendant is charged directly with "knowingly and willfully" making a false statement to the Government under 18 U.S.C. § 1001, the jury should be told that the fraudulent statements must have been deliberately made. *Id.* at 798. (It does not appear from the Court's opinion whether or not a timely objection to the trial Judge's charge was made on this issue.)

* This claim is asserted by Dioguardi and Lombardo with respect to Count 9 and by Aloï with respect to Count 10.

ernment, are the true victims of the Court's charge with respect to the wire fraud counts.

Turning first to Count 10 which involved the telephone call from Buster Aloï in Florida to Vincent Aloï in Suffern, New York it is claimed that the Court failed to charge criminal intent, failed to describe the scheme to defraud, failed to indicate that the scheme must already have been in existence, and worst of all used the term "in furtherance of" rather than "in execution of", a "fatal" variance (Aloï Brief, 36-38).

The intent of the participants to this telephone call—Graifer, Buster Aloï and Vincent Aloï—to use it for the purpose of advancing their fraudulent scheme could hardly have been in doubt. Graifer flew down to Florida and importuned Buster Aloï to make the call for the specific purpose of obtaining Vincent Aloï's commitment to cooperate, ("straighten out") and positively advance the fraudulent scheme, i.e. set new terms by which Hellerman's participation would be acceptable to Fusco and Savino. Graifer testified that this was his purpose in going to Florida. Nothing could have been more purposeful—or crucial to the completed execution of the scheme—than this telephone call. And, as Graifer further testified, the purpose of the call was realized. By the time Buster Aloï hung up the phone everything had been "taken care of". Vincent Aloï had assured him that he would arrange new terms for Hellerman to do the deal. Given this evidence and the Court's instructions on appellants criminal intent in connection with the conspiracy count, the absence of a further charge on the issue of intent was not prejudicial, let alone plain error.*

* This is not to say that the element of intent was totally absent from the charge. The court stressed that the call must have been made "in furtherance of the unlawful scheme" and must have been "within the reasonable contemplation" of the defendants (Tr. 5500-01).

The remaining criticisms of the charge under Count 10 can be quickly disposed of. The fraudulent scheme *was* described. It had been carefully analyzed when the Court described the Government's theory of the case. It was specifically referred to in the context of the charge on Count 10 as "the unlawful scheme to defraud alleged in the indictment" (Tr. 5501). Considering the jury's intimate familiarity with the smallest details of the scheme by this stage of the trial proceedings, it would have been an exercise in redundancy for the Court once again to describe the scheme.

Likewise no prejudice could have resulted from the Court's failure dutifully to remind the jury that the scheme must already have been in existence at the time the call was made. Graifer went all the way down to Florida precisely because Vincent Aloï had temporarily killed a deal which was already several months under way. By this telephone call Vincent Aloï joined the already existing conspiracy and at the same time contributed significantly to its execution.

The Court's use of the term "in furtherance of" hardly seems a defect one would call fatal. The sense of the phrase is to all intents and purposes the same as that found in the statute—"in execution of". For this reason it is not surprising to find the supposedly fatal term used interchangeably with the statutory term by the courts in discussing the elements of mail fraud or wire fraud. See e.g. *United States v. Sheiner*, 273 F. Supp. 977, 982 (S.D.N.Y. 1967), *aff'd*, 410 F.2d 337 (2d Cir.), *cert. denied*, 396 U.S. 825 (1969); *Pritchard v. United States*, 386 F.2d 760, 764 (8th Cir. 1967), *cert. denied sub nom. Borchelt v. United States*, 390 U.S. 1004 (1968); *Gold v. United States*, 350 F.2d 953, 956 (8th Cir. 1965); *Beck v. United States*, 305 F.2d 595, 598 (10th Cir.), *cert. denied*, 371 U.S. 890 (1962); *United States v. Shavin*, 287 F.2d 647, 649-50 (9th Cir. 1961); *United States v. Riedel*, 126 F.2d 81, 82 (7th Cir. 1942).

The District Court's charge on Count 9 followed immediately upon its analysis of the elements of wire fraud in Count 10. For this reason the distinctions rather than the similarities between the two counts were emphasized. The principal distinction was that at the time of the telephone call in Count 9 between Dioguardi * in New York and Buster Aloï in Florida, the defendants Vincent Aloï and Savino had not yet joined the conspiracy. Therefore Judge Knapp was at pains to impress upon the jury that Vincent Aloï and Savino could not be held retroactively liable for this wire fraud offense. There was no reason then to repeat everything which had already been said with respect to Count 10. It is obvious that the Court's two sentence summary on Count 9 ** was meant to be no more than that; it was not intended to substitute for or state a rule any different from that which governed the wire fraud counts previously discussed.

In discussing Count 9 the Dioguardi brief focuses prime attention on the claim that in fact the telephone call between Dioguardi and Buster Aloï was for the purpose of *formulating* the scheme or, in the words of the *Ryan* case, "for the purpose of concocting the schemes to defraud." *United States v. Ryan*, 123 F. 634, 636 (E.D. Ark., 1903). But, as the proof amply demonstrates, by the time Dioguardi descended from his office to talk by phone with Buster Aloï the fraudulent scheme to unload the AYSL stock was already firmly established. The telephone call between the two family leaders served to confirm and guarantee the plans already made and affirmatively to advance the de-

* Lombardo was present in New York with Dioguardi and was the person who placed the call to Buster Aloï.

** "Therefore, as to this act, you may find guilty only the defendant Dioguardi and the defendant Lombardo.

"And then, of course, only if you have already found them guilty of the original conspiracy and have found this call was one of the means by which that conspiracy was carried into effect" (Tr. 5502).

tailed execution of the scheme. The role of the telephone call in this case was neither accidental nor inconsequential. It was central to the successful execution of the fraudulent scheme that had already been devised. It brought about the blessing of the two leaders, thus guaranteeing that prior commitments on both sides would be met.

In order for an offense to lie under the mail fraud or the wire fraud sections of the Criminal Code, it is not essential that the mail or telephone call be directed to a victim of the fraudulent scheme. It is sufficient that the mails or the telephone wires be used to advance the scheme; and, communications between co-conspirators are often the most important means of advancing and executing such a scheme. As was pointed out long ago by the Court in *Freeman v. United States*, 244 F.1 (7th Cir.), *cert. denied*, 245 U.S. 654 (1917).

"The execution of the scheme may be, and here was, most effectively furthered, and the purpose of its execution or attempted execution most directly served, through communication by mail between the persons who concocted or entered into it."
Id. at 9.

To the same effect see *Stewart v. United States*, 300 F. 769, 774-775 (8th Cir. 1924).

POINT III

Judge Knapp did not abuse his discretion in denying Aloï, Lombardo and Savino a severance from Dioguardi.

Aloï and Lombardo maintain that they were denied due process as a result of the trial court's refusal to sever their trials from that of the appellant Dioguardi. They claim that Dioguardi's notoriety as an underworld figure neces-

sarily infected the trial proceedings at all stages, resulting in cumulative prejudice that deprived Aloï and Lombardo of a fair trial. The claim is without merit.

Both Aloï and Lombardo concede that as a matter of law they were properly joined as defendants under Rule 8(b), Federal Rules of Criminal Procedure,* *see* Brief for Appellant Aloï, at p. 49, n.103. Their challenge proceeds here, as it did below, under Rule 14, Federal Rule of Criminal Procedure, which provides, in pertinent part as follows:

Rule 14. Relief from Prejudicial Joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment . . . or by such joinder for trial together, the court *may* order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. . . . [emphasis added].

It is well settled that the decision whether to grant a severance under Rule 14 is committed to the discretion of the trial judge. *United States v. Projansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States v. Mazzochi*, 424 F.2d 49, 52 (2d Cir. 1970); *United States v. Garber*, 413 F.2d 284, 285 (2d Cir. 1969); *United States v. Kelly*, 349 F.2d 720, 759 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *see also*, Notes of Advisory Committee on Rules, Rule 14 ("This rule is a restatement

* Rule 8(b), F.R. Crim. P. provides:

Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

of existing law under which severance and other similar relief is entirely in the discretion of the court. . . .). As Professor Moore has noted, defendants who move for a severance under Rule 14, have "the difficult burden of demonstrating that [they are] sufficiently prejudiced to warrant severance. . . . The determination of the elusive criterion of prejudice rests in judicial discretion at the trial level, and is virtually unreviewable." 8A Moore, Federal Practice, § 14.02[1]. An appellate court will not reverse a decision by a trial judge refusing to grant a severance absent a clear showing of abuse of discretion, *see Oppen v. United States*, 348 U.S. 84, 95 (1954); *United States v. Bentvena*, 319 F.2d 916, 932 (2d Cir.), *cert. denied, sub nom. Macino v. United States*, 375 U.S. 940 (1963); *United States v. Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *United States v. De Sapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971). Appellants have failed to meet their burden of showing prejudice at any stage of the proceeding. Under the circumstances of this case, the trial court acted well within the scope of its authority in denying the motions for severance.

A. Selection of the Jury

When a claim of severance is based upon unfavorable pre-trial publicity or the notoriety of a co-defendant, the effect of prejudice must be tested on the *voir dire* of the talesmen. *Cf. Application of Gottesman*, 332 F.2d 975 (2d Cir. 1964) and *Application of Cohn*, 332 F.2d 976 (2d Cir. 1964); *Dennis v. United States*, 302 F.2d 5, 8 (10th Cir. 1962); *United States v. Bentvena*, 193 F. Supp. 485 (S.D.N.Y. 1960), *aff'd*, 319 F.2d 916 (2d Cir.), *cert. denied, sub nom. Macino v. United States*, 375 U.S. 940 (1963). Accordingly, Aloï and Lombardo argue here that procedures employed by the trial court to select the trial jury were inadequate to purge from the courtroom the alleged taint resulting from Dioguardi's reputation.

The trial judge was acutely aware of his responsibilities in selecting a fair and impartial jury. The *voir dire* of the panel, conducted by the court, lasted three full days, until a jury of twelve and six alternates was chosen. By prearrangement, a list of names, including, *inter alia*, names of the defendants * and all unindicted co-conspirators, was furnished to all prospective jurors as they were seated in the jury box. Each potential juror was asked to consider whether he recognized any name on the list. Out of an abundance of caution, the court then instructed any prospective juror who recognized a name on the list to approach the judge and counsel at the side bar for discussion. This procedure was designed to avoid singling out any one of the defendants as a person about whom unfavorable information was known (JT: 41).** At the side bar, Judge Knapp questioned the talesman concerning his knowledge of the defendants. When a prospective juror indicated knowledge of a defendant's alleged illegal activities, he was generally excused for cause. Other talesmen, who had heard of one of the defendants but could not recall the context, or who assured the court that despite their familiarity with a defendant's background, they could decide the case impartially on the facts, were not removed for cause but were generally excused after challenge by either side. To be sure, Winifred Mullen, one of the original 12 persons chosen for the jury, who recognized the name "John Dioguardi," did serve throughout trial. But her responses to the court's questioning indicated that she did not connect Dioguardi with any illegal activities, and that she was thoroughly free from bias (JT: 113-115, Jr. 94-99).

Throughout the three days of jury selection Judge Knapp continued to urge prospective jurors to reconsider the list of names and search their memory for any trace of recogni-

* At the request of Dioguardi's counsel, the defendant Dioguardi was listed as John Dioguardi as well as Johnny Dio.

** Reference to the jury selection minutes are designated "JT" followed by the page number.

tion. Finally, on the fourth day when 12 jurors and six alternates were chosen, the trial judge, in the spirit that characterized his careful approach to selection of the jury, informed counsel that short of declaring a mistrial he was prepared to take any steps they wished him to take with respect to "this matter of the jurors" (Tr. 30-31). In the same spirit, Judge Knapp, *sua sponte*, decided to interview each juror and each alternate in the robing room to inquire one last time as to possible prejudice (Tr. 45-130). After three and one-half days' of inquiry the court was fully satisfied that an impartial and unbiased jury had been chosen, and appellants point to nothing in the record to justify a contrary claim.*

Aloi and Lombardo assert that in view of conflicting approaches to jury selection among defense counsel, the court's rule of unanimity with respect to defense challenges effectively prevented them from exercising their rights under Rule 24, F.R. Crim. P.** In fact, selection of the jury under the rule of unanimity had proceeded through 14 defense and 5 government challenges before defense counsel first alleged that a "conflict" existed. In any event, a requirement of unanimity with respect to peremptory challenges in a multiple-defendant case is well-within the discretion of the trial court. *Stilson v. United States*, 250 U.S. 583, 586 (1919); *United States v. Crutcher*, 405 F.2d 239, 245 (2d Cir. 1968), *cert. denied*, 394 U.S. 908 (1969) (three defendants granted eleven challenges to be exercised jointly).***

* The trial court granted 20 challenges to defense counsel and 12 challenges to the Government.

** The trial court had occasion to note that the emergence of this "conflict" may have been motivated by strategic considerations in contemplation of appeal (J.T. 381-383).

*** Indeed, when the alleged conflict was brought to the court's attention, Judge Knapp did offer to allow the defense to split their remaining challenges, three for Dioguardi and three for the remaining defendants. The offer was refused and ultimately withdrawn (J.T. 323-330).

It is abundantly clear that the trial court made every effort to avoid any possible prejudice to the defendants in the selection of the jury. The court's extensive *voir dire* and liberal grant of peremptory challenges to the defendants assured the selection of a fair and unbiased jury. Accordingly, Aloï's and Lombardo's claims of prejudice in this respect are without merit.

B. Trial

Aloï and Lombardo further contend that whether or not a severance should have been granted at the beginning of trial, the admission of damaging evidence at trial against Dioguardi worked such substantial prejudice on Aloï and Lombardo as to render the court's failure to grant a severance reversible error.

The record reveals, however, that whatever prejudice accrued to the defendants in this case resulted solely from their own unlawful acts and from the conspiratorial agreement charged and proved at trial. These appellants were not prejudiced because they were tried with John Dioguardi but because they associated themselves in a criminal venture with him, as he did with them. This is not a case in which a severance should have been granted because a peripheral defendant, against whom the Government's proof was weak, was caught up in the net of entangling and overwhelming evidence offered against clearly culpable co-conspirators, *United States v. Kelly*, *supra*, 349 F.2d at 758-59. Instead, the proof at trial demonstrated that all the defendants played pivotal roles in the crimes charged.

Moreover, "[a] defendant is not entitled to a severance merely because the evidence against a co-defendant is more damaging than the evidence against him." *United States v. De LaRosa*, 450 F.2d 1057, 1065 (3d Cir. 1971), *cert. denied sub nom, Jones v. United States*, 405 U.S. 957 (1972). The general rule is, of course,

"... that persons jointly indicted should be tried together 'where the indictment charges . . . a crime which may be proved against all the defendants by the same evidence and which results from the same or a similar series of acts.' *United States v. Kahaner*, 203 F. Supp. 78, 80-81 (S.D.N.Y. 1962), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963)."

United States v. Borelli, *supra*, at 502. The fact that the defendants were charged with conspiracy does not, of itself, undermine the rule, as appellants seem to suggest.* Similarly, appellants' claims of error with respect to the admission of certain evidence—evidence of similar crimes, the questioning of Dioguardi concerning his prior criminal record and other such matters**—do not establish a claim of "substantial prejudice" sufficient to render the trial court's refusal to grant a severance an abuse of discretion under Rule 14. *United States v. Vega*, 458 F.2d 1234, 1236 (2d Cir. 1972), *cert. denied sub nom. Guridi v. United States*, 410 U.S. 982 (1973). When information of a potentially prejudicial nature was elicited during testimony, the trial judge carefully gave cautionary instructions to the jury (e.g. Tr. 4367). In addition, in its charge the Court reminded the jury of the limited purpose for which such testimony was admitted (Tr. 5478-79). Defense counsel did not except to that portion of the charge nor did they urge the Court to further clarify the issue. Accordingly, appellants cannot now be heard to claim error.

* Appellants argue that under the rule of *Kotteakos v. United States*, 328 U.S. 750 (1956) they were entitled to a severance because the jury might have found multiple conspiracies. The claim is frivolous in view of the clear and convincing proof of a single conspiracy. Where the evidence supports the charge of a single conspiracy the denial of a motion for severance is entirely proper. *United States v. Bynum*, 485 F.2d 490, 497 (2d Cir. 1973); *United States v. Projansky*, *supra*.

** See Brief for Appellant Alois, at 47-49. These claims are treated independently in this brief at Point V, *infra*.

Under the applicable law, and under the facts of this case, Judge Knapp acted well within the ambit of his discretion under Rule 14, F.R. Crim. P. in denying appellants' motion for severance, and the claim of error in this regard should be rejected.

POINT IV

The prosecutor in his summation did not improperly vouch for the credibility of the witness Hellerman.

Appellants contend that the prosecution improperly vouched for the credibility of its principal witness, Michael Hellerman. This occurred, it is claimed, when the Government argued that its agreement with Hellerman*—under which Hellerman could be prosecuted not only for perjury but for the entire range of offenses which he had committed if he testified falsely—supplied a motive for Hellerman to testify truthfully. Not only is this argument without merit, but also it is hard to believe that appellants even have the temerity to make it, given that the principal theme of the defense summations was that the Government knowingly used (Tr. 5150) and was giving a "free ride" (Tr. 5201) to perjurious witnesses.** *United States v. De Angelis*, 490

* Under the agreement Hellerman pleaded guilty in three cases, one of which was AYSL, and agreed to testify for the Government whenever needed. The terms of the agreement were described on Hellerman's redirect examination (Tr. 2474-2491).

** There were other substantial improprieties in the defense summations. Counsel for Aloï accused the government of tampering with evidence, specifically, altering an exhibit to corroborate evidence favorable to the Government and of destroying tapes (Tr. 5296-5300). This argument was particularly unfair, as it was based on no evidence in the case and was timed just as events in Washington had made the issue of destroying tapes a particularly sensitive one for the government.

[Footnote continued on following page]

F.2d 1004, 1012 (2d Cir. 1974) (concurring opinion of Mansfield, J.). The defense could and did belittle the no-perjury proviso as an ineffective bulwark against perjury (Tr. 5130, 5143). But surely the Government was entitled to respond to the alternating refrains of its either having been duped by or having knowingly used lying witnesses (Tr. 5215, 5150) by arguing that it had taken specific measures to discourage false testimony. *United States v. Santana*, 485 F.2d 365, 370 (2d Cir. 1973); *United States v. La Sorsa*, 480 F.2d 522 (2d Cir. 1973); *United States v. Benter*, 457 F.2d 1174 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972); *United States v. Kiamie*, 258 F.2d 924, 934 (2d Cir.), *cert. denied*, 304 U.S. 562 (1938).

In his brief Dioguardi begins the argument on this point by reviewing all the reasons why Hellerman was a bad man (pp. 55-57). No doubt he was and no doubt the jury fully realized that he was, since every crime and every bad act he had committed over the last fifteen years, ranging from the fact that he was expelled from his college fraternity for stealing potatoes from the kitchen, to the numerous stock frauds he had committed, was the subject of long cross-examination by all five defense counsel. The defense then went on to argue that in the agreement with Hellerman the Government had given away the courthouse and in effect had given Hellerman a license to commit perjury.*

Moreover Aloï's counsel also argued in closing: "Ladies and gentlemen, I respectfully submit to you that in the name of the Holy Trinity, that justice, understanding and humility before God, I beg of you, as the year 1973 draws to a close, won't you please—won't you please—bring in a verdict of not guilty as to Vincent Aloï" (Tr. 5354).

* Contrary to Dioguardi's assertion, Hellerman was only one of many witnesses and documents implicating the defendants on trial, e.g., Graifer, Kelsey, Schoengold, Winter and Nelson described the roles of the various defendants from their first-hand knowledge.

The prosecutor's response in summation was as follows:

"Mr. Schreiber: This isn't an unconditional agreement. There is a kicker in that agreement the Government made with Michael Hellerman. It is a conditional agreement. It is conditioned on Michael Hellerman testifying truthfully when he is called as a witness in connection with the case.

"If Michael Hellerman violates that agreement, if he either testifies falsely or commits any other crime, Michael Hellerman is and will be prosecuted under the terms of this agreement.

"Mr. Newman: I object.

"Mr. Schreiber: Not only for perjury—

"Mr. Newman: I object to the portion where he says will be. That is putting an insertion, putting himself into the case.

"The Court: May be.

"Mr. Schreiber: I will be happy to read the transcript.

"The Court: You can't say will be.

* * * * *

"Mr. Schreiber: The Government shall be free to prosecute Michael Hellerman with respect to any violations of the criminal law in which he may have been involved in.

"That means if Michael Hellerman lies under oath and commits perjury, he exposes himself not only to a perjury prosecution, but prosecution for everything.

"Defendants have uniformly claimed that Michael Hellerman is being paid off by the Government to testify favorably to the Government, to tell the story the Government wanted to hear and by implication, they were arguing that Michael Hellerman was lying, and that Michael Hellerman had a motive to lie.

"I submit to you, that Michael Hellerman had a motive to testify, but no motive to lie. He had a

motive to get on the stand because that is what he was required to do by the agreement, but he had no motive to lie, because the consequences of Michael Hellerman lying would be the elimination of any understanding between himself and the Government and he would be exposed for every single crime that he ever committed" (Tr. 5394-5396).

The prosecutor's argument was an entirely logical and proper response to the attacks made on the agreement by defense counsel. In any event, if a juror got the impression from these statements that the prosecutor was vouching for the credibility of his witness, that was corrected by Judge Knapp in his extremely careful and detailed charge to the jury on the testimony of accomplices:

"Another guideline deals with what is called accomplice testimony. The bulk of the testimony in this case comes from witnesses who whether or not named as defendants in the particular indictment concede they participated in the crimes charged which means in the eyes of the law, they are as guilty as the defendants on trial. The law calls such persons accomplices. The law says you are entitled to act on the testimony of such a person, but that you must subject it to special scrutiny.

"That as I say, is common sense.

"Obviously any person subjected to prosecution for a crime either has or thinks he has an interest in ingratiating himself with the government by testifying on the government's behalf. Obviously it is more comfortable to be on the witness stand than in a defendant's box.

"Obviously the law says, and it is plain common sense, you should take those factors into account when weighing the testimony of a witness but the law also says, if after having taken those factors into account, you come to the conclusion that the witness

has given truthful, i.e., factually accurate testimony, you may act upon it exactly as you would upon that of any other witness.

"So much for a bald statement of the applicable legal principles.

"In view of the fact, so much of the defense cross-examination and the defense summation is devoted to this question, I want to analyze the defense arguments and discuss them in some detail.

"In so analyzing or discussing, I don't want you to get the idea I accept or reject any of it. Such acceptance or rejection is patently your province. I merely want to have you understand the contentions.

"In discussing these contentions, I am going to focus on the witness Hellerman simply because he is the one upon whom counsel focused so sharply, and, after all, considerations applicable to him are essentially applicable to the other accomplices.

"On one hand, defendants say Hellerman has an interest in maintaining the good will of the prosecution. That is obviously true.

"As developed here, it seems that the prosecutors don't seem to have that much influence with sentencing judges.

"In one instance as we have heard, the prosecutor commended a witness for his effective cooperation in the case involving bribery of a congressional assistant and the judge nonetheless packed the witness off to jail.

"In another case, the prosecutor complained about a witness' lack of cooperation and the judge after first imposing a prison term suspended execution of the sentence and allowed the witness to escape without a day in jail.

"However, it is not reality that counts, it is the witness' perception of reality that counts and it would be foolish to think that Hellerman or any other ac-

complice would not feel more comfortable with the prosecutor's good will than with his enmity.

"Also, defendants point out that the witness knows that only the Government and not defense counsel can institute prosecutions for perjury, and that is true. As to that, it must be observed that witnesses also know that only another court, and jury can convict for perjury, or any other crime.

"Defendants also urge that Hellerman and all the accomplices have been guilty of almost every kind of fraud and deception. Indeed, they contend that the witness conceded misconduct is far worse than anything charged against defendants. To the extent you find such contentions valid, they are certainly entitled to your consideration.

"However, the only purpose for which you could consider any of these matters is for your determination of the effect they or any of them in your exclusive judgment have on the credibility of the witness and by that I mean, the factual accuracy of the testimony coming from the witnesses' mouths. These matters have no other relevancy whatever.

"It is no concern of yours or of mine why the Government decided to use these persons as witnesses rather than bringing them before you as defendants. If you find their testimony to be truthful, you should act on it regardless of whether you may think the government is treating them too leniently or, for that matter, too harshly.

"On the other hand, if after considering all of the evidence you have a reasonable doubt as to the truthfulness, that is to say, the essential accuracy of the testimony of any witness, you should disregard such testimony.

"I have told you the government's integrity or lack of it has nothing to do with the case. However, there is one modification to that instruction. You may—

looking at the situation through the eyes of the witnesses—consider what view the witness may have had of the integrity of the prosecutor.

“For example, you will probably remember the time when Hellerman dramatically recalled Mr. Schreiber’s telling him in words or substance, if you testify to anything but the absolute truth, I will prosecute you personally.

“You may very well find it vital to your appraisal of the reliability of Hellerman’s testimony to determine what he thought Mr. Schreiber meant by that.

“Did Hellerman think that Mr. Schreiber meant exactly what he said or did Hellerman take it as an instruction to say whatever might be necessary to convict these defendants regardless of the truth?” (Tr. 5466-5471)

Finally, the cases cited by Dioguardi in support of his argument involve very different situations from that here. In *United States v. Gruberger*, 431 F.2d 1062, 1068 (2d Cir. 1970), the prosecutor plainly asserted his own belief in the strength of the case, comparing it to other cases not before the jury.

“I don’t know of a case where the evidence has been as strong as it has been in this case to establish the guilt of any defendant.”

In *Patriarca v. United States*, 402 F.2d 314 (1st Cir. 1968), the convictions were upheld despite the prosecutor’s clearly having inserted his own character into the case in support of the chief government witness. There the prosecutor stated that if the jury thought the witness’ testimony was “fiction” then it accepted the fact that the fiction was “written, produced and directed by the United States Attorney’s Office, by the Federal Bureau of Investigation, by the police in Revere and the police in Boston.” And further that “I (the

prosecutor) am guilty of making up fiction." *Patriarca v. United States*, *supra*, 402 F.2d at 320.*

POINT V

The appellants were not denied a fair trial by the introduction of allegedly prejudicial or irrelevant testimony and the Court's rulings on the admissibility of evidence were correct.

Appellants make various claims based on the admission of allegedly prejudicial and irrelevant testimony (and in one case urge also that the Government's proof varied from the indictment) and also claim that various evidentiary rulings by Judge Knapp were erroneous. These claims are without merit.

A. The testimony of Dioguardi's relationship to Hellerman was properly admitted

Dioguardi asserts that the Government's theory at trial as to his guilt was that between 1969 and 1970 he and Hellerman had established a relationship whereby Dioguardi was to receive a portion of all of Hellerman's proceeds from stock swindles and that because of this relationship, Dioguardi was responsible for all stock swindles committed by Hellerman even if he was ignorant of a particular swindle. Based on this assertion he claims he was denied a fair trial because this theory of his guilt was not charged in the indictment and constituted an impermissible variance from the crime charged in the indictment. He also contends that even if the evidence of his relationship with Hellerman came within the purview of the indictment it should have been excluded because its prejudicial effect outweighed its proba-

* In *Patriarca*, moreover, the court noted that in certain special circumstances, when the prosecutor's integrity had been attacked a reply may be justifiable.

tive value. The first claim completely misstates what the proof at trial showed with respect to Dioguardi's substantial personal involvement in the AYSL fraud. The second claim ignores the fact that proof of Dioguardi's relationship to Hellerman was essential to explain Dioguardi's role in the AYSL conspiracy, to show his motive for becoming involved, and to describe the development of the conspiracy.

First, neither the proof nor the court's charge improperly varied from the indictment. The evidence of Dioguardi's personal involvement in the AYSL fraud is described in detail in the Statement of Facts and in Point I, above, but in summary, it consisted of the following:

- (1) Dioguardi specifically authorized Hellerman to commit the fraud and spoke with Buster Aloï to confirm and guarantee the terms of Hellerman's participation.
- (2) Dioguardi received the \$22,500 front money from Lombardo and turned it over to Hellerman for use in bribing brokers to tout AYSL stock.
- (3) After the deal was temporarily halted, Dioguardi spoke with Vincent Aloï and confirmed and guaranteed the new terms of the deal set by Aloï.
- (4) Dioguardi received delivery of the \$45,000 under-the-table pay-off from Vincent Aloï, with Aloï allocated \$10,000 to Fusco and Savino and \$10,000 to Lombardo, and kept \$25,000 himself to pay off a debt to Anthony Di Lorenzo from an earlier deal.

In view of this evidence, which was proven and also set out in the indictment, Dioguardi's contention that he was convicted on a basis entirely different from the charges made by the grand jury is clearly without merit.

Likewise Dioguardi's assertion that Judge Knapp's charge cut the jury loose from the indictment and allowed conviction purely on the basis of Dioguardi and Hellerman's relationship is factually inaccurate. The charge reviewed the government's overall theory of the case including Dioguardi's involvement therein and then specifically stated that the government's theory with respect to Dioguardi was that he had authorized Hellerman to interest himself in the matter (the AYSL deal) and generally supervised Hellerman's conduct with respect thereto (Tr. 5486-5488). Further, Judge Knapp carefully described the requirements for guilt of conspiracy:

"A person can't be guilty of a conspiracy just because he associates with others who happen to be so guilty. He can be guilty of conspiracy only if he knows a common undertaking is underfoot, if he knows that a common undertaking has a particular unlawful purpose and if he willfully and intentionally decides to join in the undertaking for the purpose of furthering that particular unlawful purpose" (Tr. 549).

Later he told the jury, that "a mere willing participation in acts of alleged co-conspirators knowing in a general way their intent to break the law is insufficient to establish the conspiracy" (Tr. 5514). Dioguardi in short is mistaken when he claims that Judge Knapp in effect charged the jury that if they found a relationship between Dioguardi and Hellerman they could convict Dioguardi of the AYSL conspiracy even if they found he did not know what Hellerman was doing in connection with AYSL.*

* In *Stirone v. United States*, 361 U.S. 212 (1960) the indictment charged that the defendant extorted approximately \$30,000 from a contractor, Mr. Rider, by threatening to disrupt his execution of a contract to transport ready-mixed concrete from his plant in Pennsylvania to a steel processing plant being constructed elsewhere in Pennsylvania. At trial, the government was permitted

[Footnote continued on following page]

Dioguardi's alternative contention, that the probative value of the evidence concerning his prior relationship with Hellerman was outweighed by its prejudicial effect, is equally unsubstantiated. First, the government had to prove that Hellerman worked for Dioguardi, and that Dioguardi in essence controlled Hellerman, to explain why it was necessary to have Dioguardi's authority for Hellerman to do the deal. The government's theory of the case, set out in detail in the indictment, was that the AYSL fraud resulted from

over objection to offer evidence of an effect on interstate commerce not only in ready-mixed concrete (sand) transported by the contractor but also in steel shipments leaving for Michigan and Kentucky from the steel processing plant in Pennsylvania. The court charged that as regards the interstate requirement of the statute either the sand or the steel transporting would be sufficient. The Supreme Court reversed the conviction holding that the proof of, and submission to the jury on, the theory that the steel transportation would constitute the required interstate nexus was a significant variance from the crime charged in the indictment, i.e., just the sand. An analogous situation is not present here. As shown above, the jury was not charged that it could find Dioguardi guilty of the present conspiracy if it found he had committed either a previous fraud, or the AYSL fraud, and the proof at trial focused on the AYSL fraud without suggesting that evidence of guilt on the Belmont fraud could by itself establish guilt here.

In *United States v. Pfizer*, 426 F.2d 32 (2d Cir. 1970), *aff'd* 404 U.S. 548 (1972) the convictions of various drug companies for violations of the antitrust laws were reversed essentially because there was nothing in the Court's charge which focused the jury on the primary claim in the indictment and bill of particulars that the unlawful agreements to monopolize trade had arisen out of specific meetings. This Court found that the government's summation and the Court's charge below virtually ignored the conspiratorial meetings, and instead stressed other areas of proof relating to pricing and a patent situation which had not been the basis of the indictment. It can hardly be said of the present case that either the court or the prosecutor stressed previous frauds to the exclusion of AYSL. Nor in view of the proof offered on Dioguardi's participation in the AYSL fraud can it be said that the conviction here was improperly based on evidence of their relationship or other frauds.

an agreement between two groups. One was the Aloï group which was connected to the AYSL company, and the other, the Dioguardi side, which controlled Hellerman, the master stock swindler. The agreement was the result of matchmaking between the Aloï's and Dioguardi wherein Hellerman, Dioguardi's man, would rescue the stock offering of AYSL, a company in which the Aloï's had an interest through Graifer and Lombardo. The relevance of the relationship between Dioguardi and Hellerman to the execution of the fraud is shown clearly by the testimony of Graifer to the effect that Aloï had told him he need not worry about Hellerman swindling him or messing up the deal, or stealing the \$22,500 front money, because Dioguardi had agreed to stand good for Hellerman (Tr. 492-93). Obviously the only reason for Dioguardi to stand good for Hellerman was if there was something in it for him. Thus the proof that Dioguardi received 25%-50% of Hellerman's profits was not only logical but highly relevant. Such testimony in short was not introduced to show criminal "proclivity, propensity and disposition" as Dioguardi claims in his brief. The evidence clearly showed the structure and background of the conspiracy charged in the indictment and Dioguardi's motives for participating. As such it was properly received. *United States v. Stolzenberg*, 493 F.2d 53, 54 (2d Cir. 1974); *United States v. Miller*, 478 F.2d 1315, 1318 (2d Cir. 1973), *cert. denied*, — U.S. — (1974); *United States v. Cioffi*, (2d Cir. 1974) slip op. at 2232; *United States v. Cohen*, 489 F.2d 945, 949 (2d Cir. 1973); *United States v. Del Purgatorio*, 411 F.2d 84, 86-87 (2d Cir. 1969); *United States v. Costello*, 352 F.2d 848, 854 (2d Cir.) *cert. granted on another issue*, 383 U.S. 942 (1965).

Quite apart from the existence and terms of the Hellerman-Dioguardi profit sharing arrangement is the question of Dioguardi's role in specific prior stock frauds. Contrary to the false impression created in appellants' briefs, such proof by the Government on its direct case was for the most

part carefully excluded. There were a few references to one fraud, that involving a manipulation of the stock of Belmont Franchising Corporation (e.g. Tr. 1510, 2980).^{*} The full development of the Belmont fraud, however, was only brought out by the defense during its cross-examination of Hellerman. Such references as there were during the Government's case were not error.^{**} The Belmont manipulation, also engineered by Hellerman, collapsed in May, 1970 and left several of the co-conspirators with heavy losses. These disgruntled swindlers, seeking to hold Hellerman responsible, turned to Dioguardi who controlled Hellerman. *United States v. Dioguardi, supra*, 492 F.2d at 75. These events immediately preceded the advent of the AYSL fraud in June, 1970 which was in part intended by Hellerman and Dioguardi to repay Louis Ostrer and "Hickey" DiLorenzo for the losses which they had incurred in Belmont. Thus the minimal references to Belmont adduced by the Government were particularly relevant on the issues of motive, and background and structure of the conspiratorial relationship between Hellerman and Dioguardi (see cases cited above).^{***}

^{*} The facts of the Belmont swindle are set forth in this Court's opinion upholding Dioguardi's conviction in that case. *United States v. Dioguardi*, 492 F.2d 70 (2d Cir. 1974).

^{**} When Dioguardi testified in his own defense, Judge Knapp precluded the Government from impeaching his credibility with the fact that he had been convicted of several serious felonies in the Belmont case unless the government was prepared to have Dioguardi bring out his acquittal in the Imperial case (Tr. 4112-4124).

^{***} Appellants further argue (Dioguardi Brief pp. 29-30) that otherwise admissible proof of similar acts is inadmissible if it comes from the mouths of witnesses whose testimony regarding the facts of the transactions described in the indictment, if believed, would be sufficient to convict. The contention is erroneous. See e.g. *United States v. Brettholz*, 485 F.2d 483 (2d Cir. 1973). In *Brettholz*, the Government's chief witness against Brettholz (who was charged with conspiracy and possession with intent to distribute cocaine) was Posner, a co-defendant who had pleaded guilty. Posner testified that Brettholz was the ultimate supplier of

The other allegedly prejudicial testimony on the subject of Dioguardi's relationship with Hellerman was also properly admitted. Moffitt's testimony that Fusco and Savino had told him that Hellerman was "with Johnny Dio" was admitted against Savino only, as an admission to show why Savino became involved in the AYSL deal, i.e. Savino knew he had to work through Vincent Aloï to Dioguardi to get his and Fusco's \$10,000 Trimatrix money back since Dioguardi controlled Hellerman and the money would not be repaid unless Dioguardi approved and since only Aloï could confirm deals with Dioguardi. Judge Knapp specifically instructed the jury that Moffitt's testimony on this subject could not be considered as to Dioguardi but was admissible only against Savino (Tr. 3474-3475).

Nelson's testimony that Schustek told him that if he said anything about the AYSL deal "he might get hurt because Hellerman's friend was Johnny Dio" was not inadmissible, as Dioguardi claims, because Schustek was only named as a co-conspirator in the Government's bill of particulars and not in the indictment. See Point VII, *infra*.

the cocaine. Nevertheless, this Court held that Posner had been properly permitted to testify that Brettholz had supplied him with cocaine on ten prior occasions. Moreover, as appellants here do, appellant Brettholz had relied on *United States v. De Cicco*, 435 F.2d 478 (2d Cir. 1970) and had argued that the defense had not put intent in issue but had instead wholly denied knowledge and participation. Such self-serving categorizations by the defense of the relevance of proof of intent cannot be accepted at face value. In the present case, Dioguardi admitted a close relationship with Hellerman and admitted that Hellerman had discussed AYSL stock with him (Dioguardi Brief pp. 20-23). Thus quite apart from the similar act proof against Dioguardi being admissible on the issues of motive and structure of the conspiracy, it was also admissible with respect to the issue of his knowledge of the AYSL manipulation and his conspiratorial intent.

B. The Evidence of Lombardo's Loan to Hellerman Was Admissible and the Cross-examination of Lombardo on his Loan Was Proper

Lombardo claims that the admission of testimony by Hellerman that he had borrowed \$10,000 from Lombardo at two percent interest per week was improper because Judge Knapp had severed the extortionate credit count against Lombardo which concerned this loan and the testimony was irrelevant and prejudicial. Lombardo also claims that the cross-examination on the subject of his lists was error on the grounds that his loans were a collateral issue and the prosecution was therefore bound by Lombardo's denials of such activity on direct examination; that the questions with respect to the lists involved improper cross-examination on prior bad acts; and that the lists themselves were confusing and prejudicial. These claims are without merit.

It is well established that the trial court has broad discretion to admit facts tending to suggest a motive for the act charged. *Moore v. United States*, 150 U.S. 57, 61 (1893); *United States v. Cifarelli*, 401 F.2d 512 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968).

Clearly the trial court did not abuse its discretion in this instance. Hellerman's \$10,000 loan from Lombardo directly provided a motive for Lombardo's role in the AYSL deal. To argue as Lombardo does that the existence of the loan was no motive for Lombardo to bring Hellerman into the deal ignores the central fact that as a result of his having brought Hellerman into the deal and of his other acts in connection with the fraud, he (Lombardo) received from the proceeds of the fraud the \$10,000 which he had loaned Hellerman.*

* The fact that others may have suggested that Lombardo had other motives does not make inadmissible evidence of his
[Footnote continued on following page]

As Judge Knapp observed in argument on this question at the side bar during trial:

"The Government's theory of this case is the reason Lombardo got himself involved in At-Your-Service Leasing was because of his loanshark relationship with Hellerman" (Tr. 4684).

Lombardo also argues that since Judge Knapp had severed the extortionate credit transaction count against Lombardo (for this very same loan), testimony about the loan was improper. This contention is plainly erroneous since Judge Knapp made very clear in his opinion severing the count and at the trial when the matter arose that he was granting the severance only because in a complicated stock manipulation case, a count of extortionate credit might "confuse" the jury, and that he specifically was ruling that the severance "didn't stop the government from proving the facts necessary" (Tr. 1728).^{*} *United States v. Weiss*, 491 F.2d 460, 467 (2d Cir. 1974); *United States v. Egenberg*, 441 F.2d 441 (2d Cir. 1971).

In addition, evidence that the loan was made only after it was approved by Dioguardi and guaranteed between

most likely motive, i.e., the repayment of \$10,000. Also, specifically, Lombardo refers in his brief to the fact that Graifer said that it was Buster Aloï who first suggested Hellerman's name (Tr. 475) and to the fact that Hellerman did not testify that Lombardo made a condition of his doing the deal originally the repayment of the loan. Neither testimony refutes the Government's theory that the jury could equally find that the \$10,000 repayment was a motive for Lombardo or, in any event, that it was proper to explain to the jury why Lombardo was getting \$10,000 repaid from the proceeds of the fraud. Lombardo obviously thought the \$10,000 repayment provided a motive and was an important part of the case against him since on his direct examination he specifically said that he had never loaned Hellerman a penny (Tr. 4638).

* He also stated in his opinion that he was granting the motion for severance although the defendants had not presented a strong showing of prejudice.

Dioguardi and Buster Aloï, and that the interest payments had been reduced after a meeting among Lombardo, Buster Aloï, Dioguardi and Hellerman was highly probative of the structure of the conspiratorial relationships. The confirming and guaranteeing of the Hellerman loan was achieved in the same way and for the same purpose as was the guaranteeing between Buster Aloï and Dioguardi of Lombardo and AYSL's and Hellerman's obligations in the AYSL deal.*

Lombardo next claims that the use of his lists to cross-examine him was improper. Such is not the case. On direct examination, Lombardo sought to negate the Government's theory that his involvement in the AYSL fraud was motivated by desire to obtain his \$10,000 back from Hellerman. To do so he denied the existence of the loan (Tr. 4638). In addition, he went on to suggest that he was never in a position to lend anyone any money and had himself been the victim of a usurious \$9,000 loan from Graifer on which he was obligated to pay interest of \$90 per week (Tr. 4626-29). On cross-examination Lombardo again denied lending money to Hellerman or to anyone else (Tr. 4661-63, 4665-69). He was then confronted with a series of lists in his own handwriting which tended to contradict his testimony by suggesting that he was regularly in the business of lending money (Tr. 4689-4695). The lists consisted of small pieces of paper with abbreviated names and nicknames followed by figures indicating days, weeks and months. Generally the dates would appear in sequence as if the references were to week by week appointments, e.g., 7/13, 7/20, 7/27, 8/3, 8/10, 8/17, 8/24,

* Evidence of the loan was also relevant to show that Lombardo in fact did have access to money as the government contended, since it was Lombardo whose original responsibility it was to obtain and who did obtain the \$22,500 front money for Hellerman which was later returned when Vincent Aloï changed the terms of the deal (Tr. 4711-12).

8/31, 9/7, et seq., and frequently the dates were followed by numbers representing the points of interest per week. Some of the dates were crossed off. This evidence was clearly admissible and cross-examination concerning it clearly proper. It was not, as Lombardo suggests, collateral or confusing or introduced to improperly attack his moral character.* It strongly tended to contradict his denial of the motive which the Government had offered for his involvement in the AYSL fraud. The purpose of cross-examination is to test the truth of statements made on direct. *Alford v. United States*, 282 U.S. 687 (1931); *Manton v. United States*, 107 F.2d 834 (2d Cir. 1939), *cert. denied*, 309 U.S. 664 (1939). The fact that evidence of motive is suggestive of other criminal activity does not render it inadmissible. *United States v. Egenberg*, *supra*; *United States v. Bradwell*, 388 F.2d 619 (2d Cir. 1968); *United States v. Abrams*, 357 F.2d 539 (2d Cir.), *cert. denied*, 384 U.S. 1001 (1966).

The additional use of the lists to impeach Lombardo's credibility was wholly proper. Having denied motive and having denied any capacity to lend money on his direct examination Lombardo clearly opened the door to an examination of these subjects. *United States v. Boatner*, 478 F.2d 737, 743 (2d Cir. 1973); *United States v. Vivero*, 413 F.2d 971, 972 (2d Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970). When confronted with the lists, Lombardo began an incredible series of denials and explanations of their meaning to avoid their obvious thrust. To probe these avenues and attack credibility was the entirely proper

* Lombardo contends that there was no proof the lists were written by him, that it was not clear what they meant and that they were not related to the case in time. The facts are to the contrary, however. Lombardo said he wrote the lists (Tr. 4689-90); it was clearly inferable from examining the lists that they were coded collection lists; and the lists covered exactly the period of the AYSL fraud in 1970 and into 1971 (Tr. 4784-86).

function of cross-examination and the trial court was well within its proper discretion in permitting it.* *Hattaway v. United States*, 416 F.2d 1178 (5th Cir. 1969); see also *United States v. Corrigan*, 168 F.2d 641 (2d Cir. 1948).**

* Lombardo's explanation for the lists varied; some he claimed were lists of his tips (Tr. 4690-95), others he said were lists of his weekly visits to a grocery store (Tr. 4765-67) or of his collection of insurance premiums (although he said he did not collect insurance premiums weekly) (Tr. 4676-77). Lombardo was particularly reluctant to admit that the coded nicknames on the lists were references to people mentioned in the case, e.g., "Ed. G." was not Ed Graifer but "Ed 6"; "Pat Check" for Pasquale "Checko Brown", Fusco's nickname, was according to Lombardo "Chuck" and not "Check" and Lombardo couldn't recollect whether "John Sav." was John Savino (Tr. 4695, 4737-38, 4757, 4778-79, 4783).

** It should be noted that to minimize the prejudice Judge Knapp stated to the jury and repeated during cross-examination with respect to the lists that "(Lombardo's) suggestions are just as valid as the prosecutors and the prosecution's are just as valid as his and neither of them is worth anything. All that counts is what you (the jurors) think when you look at the paper" (Tr. 4738) and specifically restricted the Government from using the expression loansharking in connection with Lombardo's lists (Tr. 4771). Lombardo also claims that Judge Knapp's charge was wrong on the law when it said bad acts could be considered on a witnesses' credibility (Tr. 5471). Lombardo takes this point in the charge out of context. It was included in the portion of Judge Knapp's charge instructing the jury to carefully scrutinize accomplice testimony, and was said in relation to the jurors' scrutiny of Hellerman's testimony (a portion of the charge very favorable to the defendants) and was far removed from any connection to Lombardo. Finally, the cross-examination on facts, which Lombardo admitted, that he lived under an assumed name with his girl friend, by whom he had a child, were proper in view of his testimony on direct that he was a devoted family man who lived at home with his wife and 13 year old daughter (Tr. 4613-15).

C. The Introduction of the So-called Inflammatory Evidence Was Not Improper

Lombardo next argues (1) that he was prejudiced as a result of being tried with Dioguardi and that his case should have been severed, and (2) that the prosecution introduced inflammatory evidence for no purpose but to secure a conviction at any cost, thus denying him a fair trial.* Both contentions are without merit. The first contention is dealt with together with the similar point of Aloï and Savino in Point III above. In his inflammatory evidence argument Lombardo lists a series of examples which he describes as purposeful efforts by the prosecution to show the jury that the case was an organized crime—Mafia case.

What should be very clear from the start is that this was a case involving organized crime. The defendants were major figures in two New York crime families. Moreover, the Government's theory of the case (proved by the evidence at trial (was that the AYSL fraud was the result of a contract, between members of these two groups, not signed and sealed before a notary, but made just as binding by the commitments of the top figures in each group. Because of these circumstances the Government went to great lengths to keep out references to "organized crime," "captains," "families" and other obvious words suggesting Mafia.**

* Lombardo makes the totally false suggestion in his brief (page 62) that perhaps the Government's purpose was because there had been an acquittal in Imperial, a related case tried more than two years before.

** Failing to find any example where the prosecution in fact used the term organized crime, Lombardo starts his brief on this point by writing "(A)gain and again the prosecutors sought to make explicit what the court's ruling attempted to limit to the implicit, i.e., the fact of the matter is that this is an organized crime case (Tr. 3228)." The quotation in the brief is not taken from testimony before the jury but from a comment at the side bar. The quotation is misleading as to what the jury heard but
[Footnote continued on following page]

This was done despite the enormous obstacle that the testimony at trial consisted almost entirely of accomplice accounts of the actions and statements of men who in fact were within the high ranks of organized crime. In over eight weeks of testimony, then, it is not surprising that a few inadvertent references came into the trial especially since the witnesses had to be constantly restrained from using their normal expressions and explaining the real positions or relationships they or the defendants had used or had with each other during the period of the trial. On the other hand without being explicit, in order to prove its theory of the case the Government did have to adduce testimony which in general terms established the relationships of the defendants and their motives, did have to respond to various tactics of defense counsel, and on cross-examination of the defendants who took the stand did, in the face of their denials on direct, have to attempt to impeach their direct testimony by relevant questioning. In no sense, however, were defendants denied a fair trial in respect of this testimony.

There follows a review of the circumstances in which the so-called inflammatory evidence cited in Lombardo's brief occurred.

it states accurately the point that the Court (as well as the prosecutor) limited what was put before the jury as to any explicit evidence of organized crime, even though the relationships within and the hierarchical structure of organized crime were in fact the essence of the Government's case. Late in the trial, in fact, Judge Knapp ruled that since the relationships among the defendants, for example, that of Vincent Aloï to Savino and Fusco and to Dioguardi, was such an obviously essential part of the Government's theory of the case, he was now prepared to permit the Government to recall Hellerman and Graifer to testify about what the defendants had told them in conversations about the other defendants specific positions within their groups and the relationships among the defendants. At that point in the trial, however, the Government chose not to recall these witnesses for this purpose.

1. The Opening Statement

The prosecutor's opening statement was fair; it informed the jury of precisely what the government intended to, and did in fact, prove. It scrupulously avoided any references to organized crime and stuck entirely to the facts, namely, that these defendants operated behind the scenes (e.g. Hellerman and Graifer were their front men), that Vincent Aloï in terms of the power he demonstrated in this case was the man at the top, that the defendants directed others (e.g. Hellerman and Graifer) to commit the fraud, that the public was bilked (e.g. see the testimony of five persons who bought AYSL stock and lost all their money) (Tr. 3543-3590), and that these defendants took their \$45,000 payoff out of the proceeds.

2. Nicknames

Generally the testimony of nicknames arose from direct testimony which related conversations. This was almost impossible to avoid because the nicknames used were those by which the people referred to were known among the defendants and witnesses who dealt with them.* Since the nicknames appeared in the context of a quotation of what someone said to someone else, it was obviously necessary to identify who that person was. Moreover, in ruling that nicknames should be struck from the indictment. Judge Knapp specifically stated that the government could mention "in its opening statement the fact that some or all of the witnesses referred to these particular defendants by nicknames."***

* For example, John Dioguardi when he took the stand testified that he knew Sebastian Aloï, Sr., Vincent Aloï's father, only by the name of Buster Aloï (Tr. 4370).

** Memorandum opinion of Judge Knapp, July 17, and October 16, 1973 (See supplemental Appendix for Lombardo). In accord with Judge Knapp's ruling the copy of the indictment submitted to the jury for use during deliberation, and the only indictment the jury saw, had had all nicknames deleted from it.

3. Lombardo's AYSL Cars—the Girl Friend and the FBI

Graifer testified that in return for Lombardo's assistance in the AYSL fraud, Lombardo received free use of a car from AYSL. In fact Lombardo had two cars from AYSL, one which he drove, and another driven by his girl friend. The records of AYSL showed that Lombardo had paid for one car, so it was necessary to point out that he had the second car, which was not paid for, as well (Tr. 429). Graifer also said that as further payment for his role in the AYSL fraud, Lombardo asked to be able to switch cars because he told Graifer he was being followed by the FBI (Tr. 430-31). This reference was unfortunate, but it was clearly volunteered and inadvertent. Lombardo told Hellerman about the FBI and switching cars as well. Later it came time for Hellerman to testify about his conversation with Lombardo as to what Lombardo was getting from AYSL in return for helping with the stock deal. This time around, however, the prosecutor having been forewarned did not bring the matter before the jury (Tr. 1754-1757).

4. Honorable Man

The term "honorable man" was made into almost a "cause celebre" during the trial by defense counsel. It first came up through Graifer when he quoted his own remarks to Hellerman, about what he thought Lombardo would tell Hellerman, namely that Graifer could be trusted to pay Hellerman at the conclusion of the deal (rather than in advance) because Graifer was an honorable man (Tr. 485). Counsel for Alois, Mr. Lewis, perked up noticeably at the notion of Graifer referring to himself as "honorable" and said, "Excuse me, I didn't hear that. Could we have it repeated, Judge" (Tr. 485). On cross-examination of Graifer Mr. Lewis used Graifer's statement that he was an

honorable man repeatedly in a series of questions on cross-examination, for example,

* * * * *

"Q. And you knew that the (AYSL stock) issue was worthless, did you not? A. Yes, sir.

"Q. And you tell the ladies and gentlemen of the jury that at that time you were an honorable man?"

Mr. Schreiber: I object to it as argumentative, your Honor.

The Court: Yes, don't argue with the witness.

Mr. Lewis: All right.

"Q. Were you an honorable man when you and your accountant got together and conceived the idea of floating a stock issue on a worthless stock? A. I can't really answer that yes or no."

The Court: Did you consider that an honorable thing to do?

The Witness: At the time, at the time we——

Mr. Lewis: Judge——

The Court: At the time.

Mr. Lewis: ——we would like to hear him.

The Witness: Yes.

The Court: He did.

"Q. Your testimony is you thought it was an honorable thing to do, to float a worthless stock issue and sell it to the public. Am I right, sir?"

Mr. Schreiber: Objection.

The Court: That is his answer. If he wants to tell why he thought so he can. If he doesn't want to, he doesn't have to.

Mr. Lewis: May I conduct my cross-examination, with all deference to your Honor?

The Court: You certainly may.

"Q. Now, you told us about having conferences with FBI agents in the year 1970 to '72; is that right? A. Yes, sir.

Q. And in those conferences did you give information to the FBI about people whom you say were involved in criminal activities other than yourself? A. Yes, sir.

"Q. You didn't tell the FBI that you were involved in criminal activities, but you told them about other people. Am I correct? A. Yes, sir.

"Q. Were you an honorable man when you were double dealing with the F.B.I.?" (Tr. 670-673).

On re-direct, the prosecutor asked Graifer, referring to Mr. Lewis' questions,

"Q. When you say that you were an honorable man do you mean to say that you were law abiding?"
A. No, sir.

"Mr. Lewis: I object to this, Judge. That is leading. Let him (Graifer) say what he means by being an honorable man.

* * * * *

"A. (by Graifer) More or less honor among thieves. We were together in our transaction and we all had to live up to our obligations (Tr. 1143)."

Under these circumstances appellants can hardly blame the government for this allegedly inflammatory statement. In any event, it was obviously of minimal prejudice since Graifer was merely confirming what he had already said about the AYSL fraud.

5. Sonny Francese, Hoffa and the Teamsters

The mention of Sonny Francese first came up in Hellerman's testimony as a statement to Hellerman by Gary Fredericks, a co-defendant. Fredericks had been hired by Hellerman to handle the sale and manipulation of some of the AYSL stock. Fredericks, however, failed to do the job and when Hellerman complained to him, in order to

get Hellerman off his back he told Hellerman that he was the son-in-law of Sonny Francese. Hellerman said he checked this out with Dioguardi and that Fredericks was no such thing (Tr. 1890-91). In any event, the reference to Francese was harmless to the defense since there was no connection drawn in the testimony between Francese and the defendant. Furthermore, as the judge pointed out, no one likely knew who Sonny Francese was until Aloï's counsel jumped up in objection to a question asked of Dioguardi during his cross-examination based on the Hellerman-Frederick's testimony saying that Francese was a major criminal (Tr. 4445-46). The mention of the Teamsters and Jimmy Hoffa's wife came up only on cross-examination of Dioguardi. Dioguardi's basic defense to the case, as expressed in his direct examination, was that his relationship with Hellerman had been wholly legitimate, that Dioguardi had met Hellerman through Hellerman's now deceased father and that if anything Dioguardi had been the victim of a number of Hellerman projects in which Dioguardi had lost money. In so testifying he put in issue the nature and extent of his relationship with Hellerman. In fact, according to Hellerman, Dioguardi had met Hellerman through Hellerman's efforts to finance a hotel in Las Vegas and Hellerman had to get Dioguardi's approval before he could obtain a loan for the hotel from the Teamster Union's pension fund (Tr. 4418-19). The fact that in late 1969, when Dioguardi claimed he was on the outs with Hellerman, he had actually taken Hellerman to meet Jimmy Hoffa's wife was part of a series of examples which showed that contrary to Dioguardi's testimony, he and Hellerman had been in intimate contact on a regular basis involving all parts of their lives during these years (Tr. 4431-32). Finally the passing mention of Paulie Bario or Paulie Barrie in cross of Dioguardi were fair and in any event absolutely harmless (Tr. 4384-85, 4488).

6. Lombardo's Cross-examination

This point is dealt with in other respects at Point V B, above. "Big Al" was one of the names on Lombardo's lists. Although it was clear it read "Big Al" and it appeared a second place on the list as "Big Al", Lombardo insisted it was "89 Al" (Tr. 4739, 4759, 4782; GX 91). The reference allegedly to Joey Gallo was not to the "infamous Joey Gallo, but to a Joseph N. Gallo, from whom Lombardo was in fact collecting payments on an AYSL car rental for Graifer (Tr. 4978).

7. Expressions Used on Cross-examination of Dioguardi

In view of Dioguardi's direct examination in which he pictured himself as an entirely legitimate businessman and claimed to have no relationship with Hellerman as described by the Government's witnesses, and in view of the fact that the Government's theory of the case was based on the relationships among the defendants, Judge Knapp ruled prior to cross-examination of Dioguardi that the Government would be permitted to inquire of Dioguardi about these relationships (Tr. 4338-40). Thereafter Dioguardi was questioned on the meaning of the term "sit down" and being associated "with" somebody. He denied having heard of the term "sit down" prior to the mention of the term at trial (Tr. 4388), and said when asked whether Hellerman was in fact "with" Johnny Dio that it was not true and that he had only heard the term "with" in the connection of someone being "with" a firm (Tr. 4380-84). Since both expressions had properly been used by witnesses on direct, it added no improper force that they were used on cross, especially in view of Dioguardi's denials.* The word "as-

* E.g. at trial there was testimony concerning at least three sit-downs. Hellerman said he participated in sit-downs or meetings to iron out problems with Dioguardi, Vincent Aloï and Fusco and Savino on Fusco and Savino's \$10,000 installment in Tri-

[Footnote continued on following page]

sociate" was first mentioned not by the prosecutor but by Dioguardi (Tr. 4402) in connection with it having been one of his "associates" at Danbury who had sent word to him that a Joseph Bald (Dioguardi's witness at trial) wanted to see him (Tr. 4399-4402). The prosecutor off-handedly asked whether this meant Bald was seeking an audience with Dioguardi. The spur of the moment question was improper, though of little significance and an objection was sustained (Tr. 4402). On direct, Dioguardi asserted that the reason he regularly went to Hellerman's restaurant, Michael's Steakhouse, on Long Island was to be in a place where he could go with his girlfriend (rather than his wife) and no one would recognize him. The Government's evidence had been that the reason he went there was because the Steakhouse was a meeting place or "hang out" for Dioguardi and his associates.

8. Italian Language

That Buster Aloï spoke to Vincent Aloï in Italian when he called him from Florida to request his help in straightening out the AYSL deal is hardly a sinister reference. In any event, it was essential to bring out that this important call was not carried on in English to explain

matrix. He also testified about sit-downs with Dioguardi in connection with the Hellerman loan from Lombardo, and about Graifer's borrowing of \$37,500 from Hellerman out of the proceeds to Hellerman from the sale of the second 50,000 shares. The term "with" was used by Moffitt, Schoengold, Kelsey and Winter to describe the relationship between Hellerman and Dioguardi. The fact of this relationship (that Hellerman was "with" Johnny Dio was critical to an understanding of the Government's case as shown for example by the fact that when Graifer first learned about Hellerman coming into the deal he was concerned because of Hellerman's reputation as a swindler. Buster Aloï however advised Graifer that because of the relationship between Hellerman and Dioguardi, "Everything is okay. I called Johnny (Dioguardi) and everything has been worked out. * * * There will be nothing to worry about. Johnny is going to stand behind Mike (Hellerman) and Ralph (Lombardo) is over here to make sure it is run right" (Tr. 492-93).

why Graifer who was present with Buster Aloï in Florida during the call and in fact had dialed Vincent Aloï's telephone number in New York, for Buster, could not state exactly what Buster had said on the phone to Vincent (Tr. 521-27). In fact, the Government did not elicit the reason that the father spoke to the son in Italian, namely, as Buster Aloï told Graifer, so they would not be understood if the F.B.I. were listening in (Tr. 524).

In short, the trial judge and the Government took extreme care to avoid inflammatory and irrelevant testimony and for the most part succeeded. The minimal departures which occurred in no way deprived the defendants of a fair trial.

D. Judge Knapp's ruling that if Vincent Aloï testified the government could cross-examine him on his state perjury conviction was not an abuse of the judge's discretion

Vincent Aloï was convicted of perjury after trial by jury in New York Supreme Court on June 26, 1973. By the time of the AYSL trial he had filed a notice of appeal of the conviction but had not yet filed his brief. During the AYSL trial Aloï's counsel requested Judge Knapp to rule on whether he would allow the government to use the conviction for impeachment if Aloï took the stand. Judge Knapp then asked the government whether it intended to use the conviction for cross-examination and the government advised that it had not determined whether or not it would seek to do so. Subsequently Judge Knapp ruled after receiving briefs on the question that if Aloï took the stand to testify in his own behalf at the trial the government could use his perjury conviction for impeachment (Tr. 14-20, 132). Aloï now claims that Judge Knapp's ruling was an abuse of his discretion. Aloï's claim is without merit as it was foreclosed to him by the holding of the Second Circuit's recent decision in *United States v. Soles*, 482 F.2d 105 (2d Cir. 1973).

In Soles, Judge Friendly wrote:

"We adopt the view that the trial judge has discretion to allow the use of impeachment of a conviction under appeal, although he must of course allow defense counsel to point out the pendency of an appeal to the jury." *Soles, supra*, 492 F.2d at 108.

Since Judge Knapp therefore had discretion to allow use of the conviction on appeal for impeachment it only remains whether he abused his discretion. In ruling that the conviction was relevant Judge Knapp stated, "I can't rationally say that perjury is one conviction that has no relevance to credibility" (Tr. 18). His finding of relevance was clearly correct. It is hard to imagine a conviction more relevant to the issue of credibility than a recent perjury conviction. *United States v. Palumbo*, 401 F.2d 270, (2d Cir. 1968), *cert. denied*, 394 U.S. 947 (1969); *United States v. Zukroff*, 416 F.2d 141 (2d Cir. 1969), *cert. denied*, 396 U.S. 1038 (1970).

E. There was no error in excluding cross-examination of Graifer on his understanding of the religious meaning of taking the oath

Aloi claims that Judge Knapp committed reversible error when on cross examination of Graifer by Aloi's counsel he refused to allow a question as to what the words of the oath "so help me God" meant to Graifer. The claim of reversible error is ridiculous.*

The exchange claimed as ground for reversal is the following:

* Aloi's counsel raised the same point when he attempted but was not permitted, immediately after Graifer was sworn as a witness, to conduct a voir dire on Graifer's understanding of the religious significance of the oath.

Cross-examination of Graifer by counsel for Aloï:

"Q. You testified that you appeared before the SEC on two occasions; right? A. Yes, sir.

"Q. One was in September of 1970 and one was in December of 1970; right? A. Yes, sir.

"Q. You were administered on oath to tell the truth, the whole truth and nothing but the truth so help you God. Am I correct, sir? A. Yes, sir.

"Q. You appeared before a Federal grand jury and you were administered the same type of oath; right? A. Yes, sir.

"Q. And you took the same oath before this jury, am I correct, in this case? A. Yes, sir.

"Q. What does an oath mean to you? A. That you are supposed to tell the truth, the whole truth.

"Q. What happens if you don't tell the truth? A. You can be penalized.

"Q. In what way? A. Contempt of Court, perjury, I assume.

"Q. Do the oaths mean anything else to you? A. I really don't know that it does.

"Q. Doesn't the word "so help me God" mean anything to you?

"The Court: That is objected to.

"Mr. Lewis: I respectfully except, sir. That's the oath.

* * * * *

"Q. Did you hear the clerk of this Court say to you to tell the truth, the whole truth, and nothing but the truth, so help you God?

"The Court: We are not going to get into the witness' religious beliefs.

"Mr. Lewis: I am not.

"The Court: "So help me God" is a religious belief.

You had an objection.

"Mr. Lewis: I move for the withdrawal of a juror.

"The Court: That motion is denied (Tr. 668-670).

Rule 26 of the Federal Rules of Criminal Procedure refers the admissibility of evidence and the competency of witnesses to principles of common law. As this Circuit observed, quoting from Wigmore, "the oath is a requisite for all testimonial statements made in court." *United States v. Fiore*, 443 F.2d 112 (2d Cir. 1971). "Oath" includes affirmation. Title 1, United States Code, Section 1: "The common law, as made applicable by Rule 26 requires neither an appeal to God nor the raising of a hand as a prerequisite to a valid oath. All that the common law requires is a form or statement which impresses upon the mind and conscience of a witness the necessity for telling the truth." *United States v. Looper*, 419 F.2d 1405 (4th Cir. 1969). Graifer's oath met this test because it is clear that Graifer understood the oath meant he was obligated to tell the truth or could be penalized for contempt of court, or perjury. He undoubtedly was a competent witness. See also, *United States v. Hardin*, 443 F.2d 735, 737 (D.C. Cir. 1970); *Gillars v. United States*, 182 F.2d 962, 969-970 (D.C. Cir. 1950).

It is within the trial judge's discretion to confine the scope of cross examination to the subject matter of the examination-in-chief. *United States v. Minuse*, 142 F.2d 388, 389 (2d Cir.), *cert. denied*, 323 U.S. 716 (1944). Here, it having been established that Graifer was a competent witness since he understood the significance of the oath, it was entirely proper for Judge Knapp to exclude cross examination on what Graifer understood by the words "so help me God" which had no relevance to the subject matter of the AYSL trial.

F. There was no error in the trial court's exclusion of evidence with respect to Hellerman's interest in certain safe deposit boxes

Appellants allege that the trial court erroneously excluded evidence that Michael Hellerman at one time had

certain safe deposit boxes. They contend that such evidence was admissible to show motive and bias on the theory that the Government had failed to prevent Hellerman from obtaining access to the boxes after he had become obligated to make restitution payments for some of his previous crimes. Thus they argue that the failure to foreclose Hellerman's access to these boxes enabled him to hide money which would otherwise have been available for restitution payments. This it is claimed arguably led Hellerman to give false testimony favorable to the Government to repay the Government's generosity. It is also hypothesized that this favorable treatment negated the force of the Government's agreement with Hellerman under which he could be prosecuted for perjury and all prior unprosecuted crimes since the failure of the Government to enforce the restitution portion of its agreement with Hellerman would have led him to assume that the Government would similarly ignore the requirement that he testify truthfully. The argument is based on a false factual premise and is accordingly without merit.

Hellerman did not come under an obligation to make restitution payments of up to \$100,000 until he was sentenced by Judge Lasker in November, 1972.* The entire defense offer of proof related to safe deposit boxes and their contents during the time period preceding Hellerman's restitution obligation and thus was utterly irrelevant to the primary claim of error now pressed on appeal.

* The basic premise of appellants' argument (Lombardo Brief p. 25) that the "deal with Morvillo" (made in November, 1970) included a promise to make restitution is unsupported by any reference to the record and is, in fact, erroneous. The additional hidden premise, that the office of the United States Attorney is or suggests itself to be responsible for identifying the assets of those ordered to make restitution and for monitoring or precluding access thereto to prevent fraudulent defaults by cooperating witnesses is utter nonsense. Absent any affirmative evidence of prosecutorial encouragement of or disinterest towards such fraud, an argument based on that premise would be wholly improper.

In addition, the only one of the three boxes as to which there was a shred of evidence that the Government had knowledge (the box at First Israel Bank) had been sealed by the I.R.S. in July, 1972 (Tr. 36733-74; 3676-77). As to the other two, one was not even in Hellerman's name and there was no evidence to suggest he could obtain access to it (Tr. 4299; 5056). On both these other boxes, the rent had not been paid for two years (Tr. 4300; 4308), and defense counsel made no offer of proof of any kind relating to who had access to it and when.

The second theory upon which it is suggested that the trial court should have admitted the evidence regarding the safe deposit boxes was that it specifically contradicted a denial by Hellerman that he or a member of his family had had any such boxes. That argument is without merit. As the trial court specifically found (Tr. 3893-95), Hellerman's denial had been in response to a long line of questions all of which, with a single exception, dealt with the period relating to the time he had been sentenced in November, 1972, the period prior to his surrender, the time he had been in custody, and thereafter. Thus the trial court correctly held that the safe deposit box evidence which related entirely to a preceding period could not contradict Hellerman's denial.*

* The cross-examination was as follows:

"Q. Who is Joan Grossman? A. Girl friend.

Q. Girl friend. From the time you went into custody, which was December of 1972—is that correct? A. December 26, yes.

Q. —did you ever see Joan Grossman? A. Yes, sir.

Q. Are you telling us that while you were in custody you went to Joan Grossman's or you were allowed to your girl friend's house? A. I didn't say that, sir. You asked me if I saw her. I saw—

Q. Did you spend time—

* * * *

A. I saw her in prison conditions guarded by marshals, guarded by guards, never—always in a marshal's office, or in a place where the prison had visitors and never alone without—just like any other normal prisoner visit.

* * * *

[Footnote continued on following page]

Q. Did you ever visit Joan Grossman at her home after Judge Lasker sentenced you to two years—have you got that question—prior to the time you were released?

Mr. Schreiber: Wait. Okay.

A. No, do not ask that question. Please ask the question after I was sentenced, or after I surrendered, sir.

Q. After you surrendered? A. After I surrendered, no.

Q. Did you go—

The Court: The answer is no.

Mr. Goldberg: All right.

Q. Did you ever travel at any time to Switzerland?

A. Yes, sir.

Q. Were you accompanied—A. You're talking when I was free, not when I was in custody.

Q. When you were free. After you decided to—A. Yes, sir.

Q. Did you have to get permission to travel to Switzerland? A. Yes, sir.

Q. And the Government gave you the permission? A. No, I think the judge gave me the permission.

Q. The judge gave you permission. You went with Joan Grossman? A. Yes, sir.

Q. And the purpose of it was, was it not, to open up a Swiss account? A. No, sir, absolutely not.

Q. Didn't you go to Switzerland in order to bury the million-dollar proceeds that you had? A. That's a lie, sir.

Q. It's a lie. You just picked Switzerland? A. No, sir, I went to Italy, too.

Q. Did you go skiing in Switzerland? A. No, sir, I went to Lucerne and Geneva.

Q. Geneva? A. Yes, sir.

Q. Did you visit any of the Swiss banks? A. No, sir.

Q. Do you have friends in Switzerland? A. No, sir.

Q. Now, you told this jury prior to this break that by May of 1970 you were broke; is that right? A. Yes, sir.

Q. And you told us that you made \$12,500 restitution and if you should ever come into money in the future you will pay the remaining portion, between \$12,500 and \$100,000, is that correct? A. No, I said when I get a job I will pay so much a week towards the \$100,000.

Q. Did you have any safe deposit boxes in your name or in the name of any relative? A. No, sir.

Q. No safe deposit boxes? A. Not that I know about.

Q. What? A. Nothing that I know of.

Q. Nothing that you know about? A. No, sir."

Such a ruling on relevance would, in any event, only be reviewable for "grave abuse" of discretion. *United States v. Gottlieb*, 493 F.2d 987, 991-92 (2d Cir. 1974).

Finally, appellants claim that the excluded contents of the safe deposit boxes would have contradicted Hellerman's assertion that in May, 1970 he was broke and thus would have reduced the believability of his assertion that he was in debt to Lombardo and was paying him a usurious rate of interest.* The only jottings on the miscellaneous scraps of paper found in the three safe deposit boxes (which were opened by order of the trial court) which could be related to the early stages of the AYSL fraud would in no way have negated the existence of the Hellerman debt to Lombardo and would have hurt the defense. An envelope found in the First Israel Box had the handwritten figures "\$22,500," "27,500" and (the total) "\$50,000" (Tr. 4450). The access records to the box showed last access on June 24 and June 27, 1970 right at the time Hellerman testified that the \$22,500 up-front money had been given to him by Dioguardi, who had gotten it from Lombardo (Tr. 3681-86).

* For Hellerman, as he himself testified, being broke meant being unable to live the lavish life to which the profits of numerous earlier frauds had made him accustomed (Tr. 2308-09; 2311). The assumption by appellants that, if not really broke, Hellerman would not have had the high-interest debt to Lombardo is the sheerest of speculation. Hellerman's financial machinations defy such facile conclusions. Indeed when under no obligation to do so and to his eventual detriment, Hellerman loaned Graifer \$37,500 from the proceeds of the AYSL stock manipulation which Graifer refused to repay when he learned that Hellerman had sold more stock than he had admitted and had never accounted for the additional proceeds.

POINT VI**Lombardo's conviction was in no way infected by the use of immunized state grand jury testimony.**

Lombardo argues that he is entitled to a new trial on the grounds that the government prosecutors received and used information traceable back to his 1970 and 1971 grand jury testimony given under a state grant of transactional immunity. Specifically, he claims that the investigative agents who provided the prosecutors with information with which to cross-examine him, had conversations about him with other persons who had had access to the state grand jury testimony. And while some of these conversations preceded Lombardo's grand jury appearances, others followed the appearances and the possibility that some of the information contained in the grand jury testimony ultimately may have seeped into the questions propounded on cross-examination requires a reversal of his conviction. The argument is utterly without merit. As the trial court specifically found (Memorandum Order of May 9, 1974), after a lengthy evidentiary hearing: (a) there was nothing revealed by Lombardo in his grand jury appearances which was not already known to those who interrogated him before the grand jury; and (b) there was not a shred of evidence to suggest that the prosecutors below had in any event, directly or indirectly, made use of the state grand jury testimony. These findings are clearly supported by the affidavit of Assistant United States Attorney Littlefield in opposition to Lombardo's motion for a new trial and by the transcript of the evidentiary hearing (e.g., H. Tr. 134-136). In no event can it be said that the trial court's findings are "wholly unsupported by evidence". *United States v. Pfingst*, 490 F.2d 262, 273 n. 11 (2d Cir. 1973). Thus, the Government has clearly met its burden of disproving taint and showing an independent source for its

information. *United States v. Catalano*, 491 F.2d 268, 272-73 (2d Cir. 1974).*

POINT VII

The prosecution did not improperly amend the indictment.

Aloi claims that the prosecution unlawfully usurped the function of the grand jury and improperly amended the indictment by including in its bill of particulars a list of some 25 co-conspirators "known but not named by the grand jury in the indictment." The contention seems to be that since defendants moved for a bill of particulars with names of unidentified co-conspirators before the superseding indictment was filed, the fact that the grand jury failed to list all persons whom it considered co-conspirators in its subsequent superseding indictment means that the jury determined that there were none. Further, the argument runs that the Government should not be allowed to treat anyone else not named in the indictment as a co-conspirator and

* Lombardo quite properly does not assert that a grant of state transactional immunity *per se* prohibits federal prosecution for the same transaction. *Murphy v. Waterfront Commission*, 378 U.S. 52, 79 (1964). He does insist, however, that "fundamental fairness" somehow requires that his conviction be reversed because the scope of the immunity he had received before the state grand jury was improperly explained to him by an assistant district attorney. But since no improper use was made by the federal prosecutors of his immunized testimony, Lombardo's equitable claim vanishes. Why a legal misapprehension by a local assistant district attorney as to the scope of the immunity granted to Lombardo should in any manner bind the United States and result in a gratuitous immunity bath to Lombardo is an utter mystery. Lombardo may feel frustrated by the creation in his mind of an undeserved and defeated expectation, but there is not the slightest basis for assuming that the instant prosecution would have differed in any manner favorable to him had Lombardo been correctly advised by the local prosecutor.

Judge Knapp consequently erred in permitting testimony concerning the acts and statements of these persons to be imputed to the defendants on trial. The argument is without merit.

First, it is well established that a person can be considered a co-conspirator for the purpose of the co-conspirator exception to the hearsay rule even if not named as a co-conspirator in the indictment. The rule is that whenever persons are engaged in a joint criminal enterprise the declarations of one are admissible against another regardless of whether the person has been named in the indictment. *United States v. Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945). Therefore as far as prejudice resulting to the defendants from the admission against them of hearsay statements of any of the 25 additional co-conspirators is concerned it is clear that the testimony could have come in even if the co-conspirators had never been identified for them prior to trial.

In any event the original and superseding indictments both specifically stated that in addition to the named defendants (13 in the original indictment and 17 in the superseding indictment) and co-conspirators (13 in the original indictment and 9 in the superseding indictment), the grand jury had charged "others to the grand jury known and unknown" as participants in the conspiracy.* Contrary to defendants' claim, in other words, the jury was not saying when it voted the superseding indictment that it knew of no other co-conspirators.

The claim that the prosecution "amended" the indictment is without legal foundation. No claim is made that the superseding indictment was in any manner insufficient

* The superseding indictment was filed three months before trial. There were no new co-conspirators named in it and the only change from the original indictment was that four persons originally named as co-conspirators were named in the superseding indictment as defendants.

to "enable the defendants to prepare for trial and avoid a claim of double jeopardy." *United States v. Weiss*, 491 F.2d 460, 466 (2d Cir. 1974).^{*} Such additional details as might be legitimately requested by defendants to enhance the specificity of allegations is appropriately furnished by a bill of particulars. In the present case the names of additional co-conspirators was requested by the defense in its bill of particulars and was provided by the Government. No claim was made below that the timing of the delivery of the information had impaired trial preparations, nor was a request made for a continuance. *United States v. Weiss*, *supra*. Nor has any claim been made of adverse reliance on assumptions concerning who was and was not a co-conspirator. *United States v. Cirillo*, slip op. 3297, 3312-15 (2d Cir. May 7, 1974).

Despite defendants' unsupported contention, there was no prejudice to them from the added list of co-conspirators because in fact, in only one case, that of Stephen Schustek, was an act or statement of one of these co-conspirators imputed to the defendants without defendants having an opportunity to cross-examine the individual committing the act, or making the statement. In Schustek's case the Government by letter of October 19, 1973 (2 weeks before trial) advised all defense counsel under *Brady v. Maryland*, 373 U.S. 83 (1963) that he and two others were witnesses who might give testimony which could tend to exonerate a

^{*} Had such claim been made, it would have been frivolous. Nevertheless defendants appear to rely on *Russell v. United States*, 369 U.S. 749 (1962) to support their claim of prejudice. In *Russell* the indictments charged the defendants with failure to answer questions before congressional subcommittees but failed to identify the subject under congressional inquiry at the time the witnesses were questioned. The court held the indictments insufficient because they failed to apprise the defendants "of what they had to be prepared to meet." In the present case, in contrast, the indictment was very long (29 pages) and extraordinarily complete, detailing in the conspiracy count each phase of the fraud and the defendants involvement therein.

defendant (JT. 9-13). So the defendants were well aware of Schustek's involvement 2 weeks before trial. Of the other co-conspirators named in the bill of particulars, two testified for the Government, one testified for the defense and the rest did or said nothing which was testified about at trial and imputed by virtue of their being a co-conspirator to any defendant. In short no prejudice has been shown and no error has been demonstrated.

POINT VIII

The Government fully complied with the court's directives concerning electronic surveillance.

Appellants contend that the Government failed and has continued even now in its failure to make disclosures ordered by the trial court with respect to the existence of federally authorized wiretaps or electronic surveillance.*

* Appellants allege that the prosecutor was required both as a matter of law and by specific order of the trial court to determine whether they had been overheard on electronic surveillance by state authorities. Both assertions are incorrect. Judge Knapp specifically rejected the defense's insistence that the United States Attorney's Office was obliged to inquire into the existence of possible state surveillance (Tr. 1953, 4539). Unlike situations in which a defendant has made an initial showing that the Government's proof has been tainted by the use of evidence derived from illegal state taps, the appellants here have made no factual assertions that relevant state taps even exist, let alone that they were illegal and that they were used by the prosecutors below. Compare, e.g., *United States v. Magaddino*, slip. op. 3103, 3111, (2d Cir. May 2, 1974). Thus, Assistant United States Attorney Schreiber's disclaimer of knowledge was an adequate response on the issue of state authorized electronic surveillance (Tr. 4540). The amorphous and uncertain claim by Dioguardi's attorney below, Mr. Goldberg, that one of three Assistants unconnected with the prosecution below had once told him that Hogan had once tapped Dioguardi's phone in the mid 1960's (Tr. 1953) appears to be contradicted by the record where Assistant United States Attorney Wing recalled that the local wiretaps in an earlier case, involved three persons named Alpert, Weiss and Bonnandonna (Tr. 5355).

The contention is blatantly false. The Government made the inquiries directed by the trial court and disclosed the non-existence of federal electronic surveillance, first orally and then in writing.

Pursuant to this Court's ruling in *United States v. Smilow*, 472 F.2d 1193 (2d Cir. 1973), the office of the United States Attorney for the Southern District of New York first telephonically and thereafter by letter, caused the Department of Justice to conduct an all-agency search as to the existence of electronic surveillance.*

* The text of the letter requesting such a search is reprinted herein:

Dear Mr. Petersen:

Pursuant to the order of the Honorable Whitman Knapp, United States District Judge, Southern District of New York, on November 21, 1973, this Office requests that you conduct an all-agency search with respect to any mechanical or electronic surveillance relating to the above-captioned case. More specifically, the Court has directed that a search be made to ascertain the following:

- (a) Any overheard conversations to which the defendants Vincent Aloï, John Dioguardi, a/k/a Johnny Dio, Ralph Lombardo, John Savino and Pasquale Fusco were a party.
- (b) Any overheard conversations made or intercepted at any place or through any facility owned or leased by any of the defendants or in which any defendant had a proprietary interest. Particular mention is made of the premises known as Jard Products, which is office space occupied by John Dioguardi in a building at 260 Fifth Avenue, New York, New York.
- (c) Any electronic surveillance directed against any defendant. If so, please advise as to the method of entry in placement of the device.
- (d) Whether information obtained from any overheard conversation or electronic surveillance was disseminated to any other agency.

[Footnote continued on following page]

Within a few weeks after having requested the Department to make the all-agency search, the United States Attorney's Office received an informal, oral report that the results of the search with respect to the Federal Bureau of Investigation were negative. This information was imparted to the judge and defense counsel (Tr. 4536-39).

After the completion of the trial, the official, written result of the all-agency search conducted by the Department of Justice was received. It stated that Alois, Lombardo, Savino and Fusco were never participants in any conversation overheard by any type of surveillance. This included the Federal Bureau of Investigation, Internal Revenue Service, Postal Service, Secret Service, Bureau of Alcohol, Tobacco and Firearms, Drug Enforcement Administration, Customs, Central Intelligence Agency, Department of Labor, Department of Defense and Department of State. With respect to Dioguardi, all the agencies' reports were negative, except for the F.B.I., which reported that Dioguardi was a participant in a conversation overheard in 1964, which predated the AYSL conspiracy and the Hellerman-Dioguardi relationship by a considerable number of years. The surveillance was on an individual other than Dioguardi.

-
- (e) Whether information obtained from any overheard conversations or electronic surveillance appears on any report.

The Court has directed the Government to report the results of the above search as expeditiously as possible. Since this trial is already in progress, time is particularly of the essence.

In light of the procedures previously established, subsequent to the Court of Appeals decision in *United States v. Jeffrey Smilow*, once your search is concluded and you have determined the existence or nonexistence of the foregoing, please prepare and forward an affidavit stating the same, which we will submit to the Court.

This information, although obviously not relevant to the trial was disclosed by letter dated April 10, 1974 to the trial judge and to Dioguardi's trial attorney.* Given

*

April 10, 1974

Honorable Whitman Knapp
United States District Judge
Southern District of New York
United States Court House
Foley Square
New York, New York 10007

RE: United States v. John Dioguardi, et al., 73 Cr. 699.
Honorable Sir:

This letter is to inform Your Honor of recent developments growing out of the above-captioned trial. We do not believe the following affects the trial in any way, but believe that you should be aware of these developments.

During the trial, defense counsel requested that the Government conduct an all-agency search to determine if any of the defendants were participants in any conversation overheard by electronic surveillance or wiretap. We reported, during the trial, that we had received an oral, negative report from the Justice Department.

Recently, we have received the enclosed communication indicating that John Dioguardi was a participant in a conversation overheard in 1964. The logs of such conversations have not been received by this office. As there was no allegation in the trial concerning John Dioguardi and At-Your-Service Leasing Corporation predating 1969, a 1964 conversation could in no way be relevant.

However, in the exercise of an abundance of caution, we have telephonically requested the Justice Department to conduct another search to verify that there were no conversations overheard after the 1964 conversation. A copy of our follow-up letter to the Department is enclosed(1).

We will, of course, keep you informed of any further developments.

Respectfully submitted,
PAUL J. CURRAN
United States Attorney

By:
JAMES SCHREIBER
Assistant United States Attorney
Telephone: 212-264-6569

[footnote continued on following page]

the fact that defense counsel had requested nothing more than that a general inquiry be made, the response was entirely adequate.* There being no unresolved factual issue with respect to the existence of relevant electronic surveillance, and no claim that a single shred of evidence at trial was derived from such surveillance, there is no reason to remand the case as requested by the appellants. *United States v. Sanchez*, 483 F.2d 1052, 1058-59 (2d Cir. 1973).

Enclosure (2)

cc: Jay Goldberg, Esq.
299 Broadway
New York, New York

(1) A teletype message has now been received from the Department of Justice confirming that none of appellants' conversations after the 1964 conversation were overheard. Judge Knapp and Dioguardi's attorney have been so informed.

(2) A copy of the specific communication which had been received from Washington was given to Judge Knapp but not furnished to Mr. Goldberg because it contained information with respect to individuals other than appellants.

* By contrast, where the defendant makes highly specific and detailed allegations that his conversations have been intercepted over specific telephones on specific dates and sets forth reasons for his belief, the Government is appropriately required to respond to such detailed charges. This is especially true where the defendant makes his allegations to avoid having to answer questions before a Grand Jury which are alleged to be based on information acquired through illegal electronic surveillance. See, *United States v. Alter*, 482 F.2d 1016, 1026-27 (9th Cir. 1973).

POINT IX

There is no evidence to support the claim of Aloï and Lombardo that they were sentenced in violation of due process or that the sentences imposed were in any respect unlawful.

Aloï and Lombardo complain that their respective sentences of imprisonment were imposed in violation of due process of law.* Specifically, each claims that the severity of his sentence was inspired by the court's illegal consideration of hearsay material contained both in the presentence report prepared by the Probation Office and in a sentencing memorandum submitted by the government at the request of the district judge. These hearsay allegations, the argument goes, unfairly cast them in the role of major organized crime figures responsible for offenses other than those for which they were convicted. In addition, it is claimed since there was insufficient opportunity effectively to rebut the allegedly false presentence information, the sentences imposed violated due process. These contentions lack merit.

By letter dated December 27, 1973, the trial court requested the government to submit specific recommendations as to sentence. Those recommendations, based on the evidence adduced at trial, the prior criminal involvement of defendants, information obtained from the F.B.I. and representing the considered judgment of the United States Attorney's office after a formal meeting, were in-

* Aloï's total term of 9 years imprisonment and \$16,000 fine breaks down as follows: 5 years and a \$10,000 fine on Count 1 (conspiracy), 4 years and a \$5,000 fine on Count 18 (false filing), to run consecutively to the sentence on Count 1, and a suspended 5 year term and \$1,000 fine on Count 10 (wire fraud). Lombardo was sentenced to concurrent 5 year terms on each of Counts 1 and 18 and a suspended 5 year term on Count 9. He was also fined a total of \$16,000.

corporated in a sentencing memorandum filed with the Court in advance of the day fixed for sentence.* Unlike the situation condemned by this Court in *United States v. Rosner*, 485 F.2d 1213, 1229-1231 (2d Cir. 1973), where the government submitted *ex parte* a sentencing memorandum which remained *in camera* for over two months and was not disclosed to the defense until the day of sentencing, the instant memorandum was served on counsel a week prior to sentencing. Aloï and Lombardo were thus put on notice that the government would make its views known with respect to the appropriate sentences to be imposed and they had a full week to answer, either orally or in writing, any inaccuracies as to material facts. Finally, the extended colloquy at sentencing makes clear that counsel for Aloï and Lombardo were given ample opportunity to respond to both the government's recommendations and to the Probation Office's presentence reports, which were disclosed pursuant to Fed. R. Crim. P. 32(c)(2) (A. 132-173). The claim that appellants were entitled to an evidentiary hearing with respect to the Government's allegations has been specifically rejected by this Court. *United States v. Rosner*, *supra*, 485 F.2d at 1230-31.

Aloï and Lombardo further allege that their sentences were improperly enhanced by the trial court's consideration of improper factors including hearsay allegations, crimes for which they had not been arrested or convicted and perjury committed during the course of trial. Contrary to the authority cited in their brief a sentencing judge may consider matters not admissible at trial, including hearsay. *United States v. Siveig*, 454 F.2d 181, 183 (2d Cir. 1972); *United States v. Schipani*, 435 F.2d 26, 27 (2d Cir. 1970), *cert. denied*, 401 U.S. 983 (1971); *United States v. Tortora*, 464 F.2d 1202, 1207-08 n. 4 (2d Cir. 1972), *cert. denied*, 410 U.S. 1063 (1973). He may consider evidence of other

* The Government's memorandum is reproduced in the joint appendix at A.

crimes, *United States v. Cifarelli*, 401 F.2d 512, 514 (2d Cir.) (per curiam), cert. denied, 393 U.S. 987 (1968); *United States v. Doyle*, 348 F.2d 715, 721 (2d Cir. 1965) (Friendly, J.); *United States v. Needles*, 472 F.2d 652, 655 (2d Cir. 1973)*; and he may consider perjury committed by a defendant in testifying at trial. *Williams v. New York*, 337 U.S. 241, 244, 251-52 (1949); *United States v. Moore*, 484 F.2d 1284, 1287 (4th Cir. 1973); *United States v. Cluchette*, 465 F.2d 749, 754 (9th Cir. 1972); *United States v. Wallace*, 418 F.2d 876, 878 (6th Cir. 1969), cert. denied, 397 U.S. 955 (1970).**

Stripped to its essentials, the defendants' argument is nothing more than a thinly veiled complaint about the purported severity of the sentences imposed. It is settled law, however, that a sentence within statutory limits is not reviewable, *United States v. Velazquez*, 482, F.2d 139, 142 (2d Cir. 1973), absent reliance on improper considerations, see *United States v. McGee*, 462 F.2d 243, 246-47 (2d Cir. 1972) (remand to insure that sentence was not influenced by conviction on one count subsequently ruled invalid), or incorrect information, see *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970) (sentence based on material misunderstanding about defendant's criminal record and extent of cooperation held violative of due process). This was not such a case.

* Appellants' suggestion that *Doyle* limits a sentencing judge to considering only those uncharged crimes which are clearly associated with the crime for which sentence is being imposed is erroneous. The language of *Doyle*, cited with specific approval in *Needles*, makes it clear that while related criminal activity is particularly important, unrelated crimes may also be considered, even where there has already been prior punishment for such crimes.

** *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969), relied on by appellants has not been followed by a different panel of the same court. *Allen v. United States*, 420 F.2d 223, 226 n. 2 (D.C. Cir. 1969) (per curiam).

Aloi and Lombardo lack support for their assertion that the sentences were attributable to their inclusion in the ranks of organized crime. They disregard the vast scope of the scheme for which they were convicted and the other serious aggravating factors properly considered by the trial court. In short, they have utterly failed to show that their sentences were "founded at least in part upon misinformation of a constitutional magnitude." *United States v. Tucker*, 404 U.S. 443, 447 (1972).*

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

BANCROFT LITTLEFIELD, JR.,
ALAN R. KAUFMAN,
T. GORMAN REILLY,
PETER L. TRUEBNER,
DANIEL BELLER,
S. ANDREW SCHAFER,
*Assistant United States Attorneys,
Of Counsel.*

* Appellants argue that the rationale of *Tucker*, which precludes a sentencing judge's reliance on a prior conviction obtained in violation of the defendant's right to counsel, should apply to preclude consideration of any crime for which there has been no conviction. (Aloi Brief, p. 77). Such an argument is too facile. It erroneously assumes that a sentencing judge automatically gives equal weight to prior convictions and prior uncharged crimes. While the absence of counsel correctly negates the permissible use of the conviction, it does not obliterate the occurrence of the criminal episode.

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State of New York)
 : ss.:
County of New York)

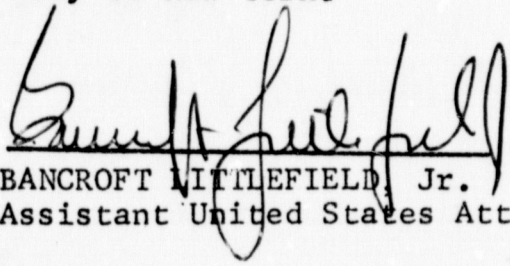
BANCROFT LITTLEFIELD, Jr., being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

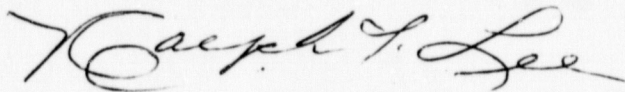
That on the ^{21st} ~~19th~~ day of June, 1974
he served ~~a copy of the within~~ ² copies of the within brief
by placing the same in a properly postpaid franked
envelope addressed:

LaRossa, Shar-el & Fischetti, Esqs.
522 Fifth Avenue
New York, New York 10036

And deponent further says that he sealed the said en-
velope and placed the same in the mail chute drop for
mailing at the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

Sworn to before me this
~~19th~~ ^{21st} day of June, 1974.


BANCROFT LITTLEFIELD, Jr.
Assistant United States Attorney



RALPH I. LEE
Notary Public, State of New York
No. 41-2292338 Queens County
Term Expires March 30, 1975

AFFIDAVIT OF MAILING

State of New York)
 : ss.:
County of New York)

BANCROFT LITTLEFIELD, Jr., being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the ²¹ ~~19th~~ day of June, 1974
he served ~~xxxxxx~~ ²¹ ~~xxxxxx~~ within 2 copies of the within brief
by placing the same in a properly postpaid franked
envelope addressed:

Joel Brenner, Esq.
1501 Franklin Avenue
Mineola, New York 11501

And deponent further says that he sealed the said en-
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Sworn to before me this

~~19th~~ 21st day of June, 1974.

Ralph I. Lee

Bancroft Littlefield, Jr.
BANCROFT LITTLEFIELD, Jr.
Assistant United States Attorney

Bancroft Littlefield, Jr.

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1975